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Administrative Search Warrants

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Note: Administrative Search Warrants

In 1967 the United States Supreme Court held in two companion cases[1] that the fourth amendment's prohibition of unreasonable searches and seizures[2] is violated when municipalities conduct routine housing and building code inspections without first obtaining search warrants.[3] Since that time, however, the Court has refused to pursue what the lower courts and most observers assumed were the full implications of these decisions,[4] ruling instead that in some circumstances, the war-

1. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967).

2. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment is made applicable to the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

3. Prior to the *See* and *Camara* decisions, most state courts and lower federal courts assumed such inspections did not require warrants. *In re* Strouse, 23 F. Cas. 261, 262 (No. 13,548) (D. Nev. 1871); *In re* Meador, 16 F. Cas. 1294 (No. 9375) (N.D. Ga. 1869); Commonwealth v. Hadley, 222 N.E.2d 681 (Mass. 1966), *vacated sub nom.* Hadley v. Massachusetts, 388 U.S. 464 (1967); St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960); State *ex rel.* Eaton v. Price, 168 Ohio St. 123, *aff'd by an equally divided court sub nom.* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1958); Perry v. City of Birmingham, 38 Ala. App. 460, 88 So. 2d 577 (1956); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955). However, in District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), the court reversed a conviction for refusing to permit a health inspector to enter without a warrant, stating:

> The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home. . . . To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection is a fantastic absurdity.

178 F.2d at 16-17. The United States Supreme Court affirmed on other grounds, 339 U.S. 1 (1950).

4. Most courts seemed to anticipate that *Camara* and *See* would have across-the-board application to all, or nearly all, administrative inspections. For example, in the following decisions the courts assumed the inspections at issue fell under the *Camara* and *See* rule, although they were not simple code enforcement inspections; interestingly enough, in most of the cases the court found another ground for upholding the inspection: United States v. Biswell, 442 F.2d 1184 (10th Cir. 1971), *rev'd*, 406 U.S. 311 (1972); United States v. Thriftimart, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *reh. denied*, 400 U.S. 1002 (1971) (inspection under the Federal Food, Drug and Cosmetic

rant requirement is inapplicable.[5] Although six cases in the area of administrative search warrants have now been decided,[6] the Court has not yet articulated a workable standard for determining when a warrant is required. As a result, administrators of agencies charged with performing regulatory inspections are faced with the Hobson's choice of either foregoing the routine use of warrants and thereby risking frequent challenges to their authority or developing what are destined

Act; consent to inspection held valid); United States v. Kramer, 418 F.2d 987 (8th Cir. 1969); United States v. Golden, 413 F.2d 1010 (4th Cir. 1969) (although the premises inspected were open to the public and no objection was made to the search, the court seems to imply that in the absence of these circumstances a warrant would have been required for an inspection by a Treasury agent of premises where firearms were sold); United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1969); United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968); United States v. Kendall Co., 324 F. Supp. 628 (D. Mass. 1971); United States v. Undetermined Quantity of Depressant or Stimulant Drugs, 282 F. Supp. 543 (S.D. Fla. 1968). *But see* State Real Estate Comm'r v. Roberts, 441 Pa. 159, 271 F.2d 246 (1970), *cert. denied*, 402 U.S. 905 (1971) (statute authorizing suspension of broker's license for refusal to permit warrantless inspections of escrow accounts held constitutional; *See* not applicable where individual voluntarily enters a field which requires licensing by the state); People v. White, 259 Cal. App. 2d 923, 65 Cal. Rptr. 923 (App. Dept. Super. Ct. L. A. 1968) (acceptance of state license to operate a convalescent home constituted implied consent to inspections required by licensing statute, taking warrantless inspections by county health department out of *See* rule). Several courts, recognizing the special role of liquor regulation in the constitutional scheme, held *See* inapplicable to inspections of premises where liquor was sold. United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968); United States v. Sessions, 283 F. Supp. 746 (N.D. Ga. 1968); Pride Club, Inc. v. State, 25 Utah 2d 333, 481 P.2d 669 (1971).

Many law review commentaries also seemed to have assumed that *Camara* and *See* would apply to most other types of administrative inspections. *See, e.g.*, Edelman, *Search Warrants and Sanitation Requirements—The New Look in Enforcement*, 45 DENVER L.J. 296 (1968); Note, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALB. L. REV. 155 (1967); Note, *Camara and See: A Constitutional Problem With Effect on Air Pollution*, 10 ARIZ. L. REV. 120 (1968); Note, *Right of the People to Be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. REV. 1119 (1967).

5. United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

6. United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967); Frank v. Maryland, 359 U.S. 360 (1959). Almeida-Sanchez v. United States, 413 U.S. 266 (1973), has not been included in the above list since, although it includes some discussion of administrative searches, the case involved roving border searches which are beyond the scope of this Note.

to be clumsy systems for the issuance of search warrants. The primary purposes of this Note are, first, to survey the existing law in order to identify those types of inspections for which warrants are required and, second, to suggest changes in Minnesota law so that it complies with the Court's restrictions on administrative inspections.

I. INTRODUCTION

In the past several decades virtually every city in the United States has enacted codes prescribing health, safety, plumbing and sanitation requirements for buildings within its jurisdiction.[7] In addition, the federal, state and local governments closely regulate certain business activities which could otherwise defraud or endanger the public. Physical inspections by representatives of administrative agencies, often in connection with the issuance of a license to do business, are the primary means of enforcing these measures. The inspections are of two general types. A "complaint" inspection occurs when a third party informs the enforcing agency of a suspected violation and an inspector is then dispatched to determine whether the violation in fact exists. Supplementing "complaint" inspections, which by themselves result in only spotty enforcement,[8] are "area" or "periodic" inspections in which every structure in a particular area or every business covered by a particular law is inspected over a period of time. Such inspections are usually undertaken without evidence that a violation exists on the premises to be inspected. Since many common violations are not apparent to third parties or even to the occupant of the premises, area or periodic inspections are usually considered to be essential to an adequate level of enforcement.[9]

7. Many of these codes were enacted in response to the Housing Act of 1954, which required any city applying for federal urban renewal assistance to have a "workable program" to eliminate urban blight. Under that provision, the Administrator required that a city have a plan for code enforcement in order to be eligible. Following several amendments, the statute now provides that no workable program shall be certified or recertified unless the locality has had an adequate housing code in effect for six months and is carrying out an effective program of enforcement. 68 Stat. 623, *as amended*, 42 U.S.C. § 1451(c) (Supp. 1973). *See* Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1260, n.19 (1966); LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See cases*, 1967 SUP. CT. REV. 1; Note, *Enforcement of Municpal Housing Codes*, 78 HARV. L. REV. 801 (1965).

8. *See* Note, *supra* note 7.

9. *See generally* Gribetz and Grad, *supra* note 7; Note, *supra*

The penalties for noncompliance are similar for both the municipal codes and the measures regulating specific business activities. Generally, a violation constitutes a misdemeanor; however, many of the ordinances and statutes also provide that no one may be convicted unless he has first failed to correct the violation within a reasonable time after the issuance of an official order instructing him to do so.[10] In addition, the enforcing agency is usually authorized to invoke administrative remedies, so that licenses or permits may be revoked or buildings tagged before prosecution is sought. Purely civil penalties are prescribed in relatively few instances, although it has been suggested that in many circumstances these may be preferable from the point of view of the enforcing agency.[11]

Throughout this Note inspections will be frequently described as either "routine" or "nonroutine." The term "routine" will be used to refer to area and periodic inspections as well as all other systematic inspections not instigated by a complaint or tip, such as licensing inspections in the regular course of issuance. In addition, a distinction will be made between measures regulating the physical condition and charac-

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note 7; Camara v. Municipal Court, 387 U.S. 523, 536 n.12 (1967).

10. For example, the Minneapolis Code of Ordinances provides:

> 67.040 *Service of Notices.* Whenever the . . . Director of Inspections determines that there has been a violation, or that there are reasonable grounds to believe that there has been a violation, of any provision of this Code he shall give notice of such violation . . . to the person . . . responsible therefor. Such notice shall:
>
> a) Be in writing;
>
> . . . .
>
> c) Specify the violation which exists and remedial action required;
>
> d) *Allow a reasonable time for the performance of any act it requires*;
>
> e) Be served upon the owner. . .;
>
> f) Notwithstanding the other provisions of this section, a notice of violation shall not be required for violations of Sections . . . . (listed are several sections, not including those covering most typical code violations).

MINNEAPOLIS CODE OF ORDINANCES § 67.040 (1971) (emphasis added). *See also* DULUTH LEGIS. CODE § 29A-4(1) (Supp. 1966); ST. PAUL LEGIS. CODE § 54.18(d) (1965).

11. Gribetz and Grad, *supra* note 7, at 1275-81. The basic disadvantage of criminal sanctions is that they do not result in either repairs of sub-standard buildings or deterrence of other owners, since they are directed at the culpability of the defendant rather than the condition of the building. In addition, personal jurisdiction, service and appearance are required, adjournments and delays are frequent, and courts are reluctant to treat code violators as criminals and so rarely impose strict penalties. *Id.*

teristics of buildings and those regulating specific business activities since, although it has not been so stated by the Court, the classification of a provision as one or the other may sometimes determine whether its enforcement inspections require a warrant.

II. THE SUPREME COURT'S APPROACH

A. The Supreme Court Cases

The Supreme Court's first attempt to define the restrictions applicable to administrative searches emphasized the "civil" nature of an administrative search as opposed to that of a traditional criminal search. In the 1959 decision of *Frank v. Maryland*[12] a Baltimore Health Department official, acting on the complaint of a neighbor, inspected several houses on appellant's block in order to find the source of a rat infestation.[13] Appellant, however, refused to permit an inspection of his premises and was convicted of a violation of the municipal code which permitted warrantless entry by officials based on "cause to suspect a nuisance exists." A five-man majority of the Supreme Court found the code provision valid and held that appellant's conviction for refusing to allow entry did not violate the due process clause of the fourteenth amendment. The Court reasoned that since the constitutional warrant requirement was directed primarily toward searches for evidence to be used in criminal prosecutions,[14] the inspection touched

12. 359 U.S. 360 (1959).

13. The area outside the appellant's house was filled with one-half ton of straw, trash and rodent feces. *Id.* at 361.

14. Much of the controversy which has been engendered by the application of the fourth amendment's protections to routine administrative inspections has involved two closely-related issues: 1) whether the relationship between the fourth and the fifth amendments is such that the fourth amendment's requirement of a warrant applies only to searches for evidence to be used in a criminal proceeding; and 2) whether the two clauses of the fourth amendment are interdependent, so that possession of a valid warrant is a prerequisite to a reasonable search except in a few narrowly defined situations.

1) Proponents of the view that the fourth amendment is to be read in *pari materia* with the fifth amendment and thus be applied only in criminal cases, rely principally on the English case of Entick v. Carrington, 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765) (reported more briefly at 95 Eng. Rep. 807), a criminal case usually considered to be the predecessor of the fourth amendment. In that case Lord Camden declared void the writs of assistance and general warrants used to conduct searches on the mere suspicion of illegal activity. In Boyd v. United States, 116 U.S. 616 (1886), the Court held that the fourth amendment was violated by an order compelling production of documents

"at most upon the periphery of the important interests safeguarded by the Fourth Amendment's protection against official intrusion."[15] The opinion by Mr. Justice Frankfurter emphasized the indispensable importance of health inspections, the insubstantiality of the intrusion on individual privacy and the burden a search warrant requirement would impose on agencies charged with carrying out inspection programs. Under the *Frank* view, then, only inspections to uncover evidence for use in criminal prosecutions would require a warrant.

Eight years later the Court overruled *Frank* in two cases which, unlike *Frank*, involved area inspections for municipal code violations. In *Camara v. Municipal Court*[16] appellant, lessee of the ground floor of an apartment building, twice refused to allow a housing inspector access to a part of the leased premises without a search warrant. Appellant's landlord had informed the inspector during an annual area inspection that the rear portion of the leasehold was being used for residential purposes contrary to the building's occupancy permit. Appellant was arrested and convicted for refusing to permit inspection in violation of the San Francisco Housing Code. Reversing a decision of the California Supreme Court, the Court held that an administrative inspection such as that in *Camara* violates the fourth amendment when conducted without a search warrant. The Court rejected the civil-criminal distinction postulated in *Frank*, recognizing that a fourth amend-

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where the severe penalties imposed by the customs laws approximated criminal penalties. However, the Court usually speaks of the fourth amendment interest as being based on privacy rather than self-protection. *See, e.g.*, Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). *Cf.* Frank v. Maryland, 359 U.S. 360 (1959), in which the Court recognized both self-protection and protection of privacy to be within the fourth amendment. *Id.* at 365.

2) The current view of the Court is that the clauses of the fourth amendment should be read interdependently. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Camara v. Municipal Court, 387 U.S. 523 (1967); Trupiano v. United States, 334 U.S. 699 (1948); McDonald v. United States, 335 U.S. 451, 456 (1938). These cases view the warrant requirement as an independent constitutional requirement, so that except in a few carefully defined types of cases, a search of private property is unreasonable if not authorized by a valid search warrant. However, the "narrowly-defined" exceptions often seem to swallow the rule.

A more complete discussion of these issues may be found in Note, *The Right of the People to Be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. REV. 1119 (1967) and Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?*, 1972 WASH. U.L.Q. 313.

15. Frank v. Maryland, 359 U.S. 360, 367 (1967).

16. 387 U.S. 523 (1967).

ment right of privacy could be jeopardized even where no criminal prosecution was involved:

> [W]e cannot agree that the Fourth Amendment interests at stake in these cases are merely "peripheral". It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[17]

The opinion further noted that "even accepting *Frank's* rather remarkable premise," regulatory codes providing for inspection are usually enforced by criminal process.[18] However, the Court refused to accept appellant's view that the traditional probable cause standard should apply to code inspection programs, making it necessary to show probable cause to believe that a violation existed on the particular premises to be inspected.[19] Instead, the need to search, would be balanced against the invasion entailed by the search and sufficient cause would be deemed to exist if reasonable administrative standards for conducting an area inspection were satisfied with regard to a particular dwelling.[20] The Court suggested, but did not seem to require, that normally a warrant should be sought in the case of an *area* inspection only after the citizen refused to permit a warrantless inspection:

> [M]ost citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.[21]

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17. Camara v. Municipal Court, 387 U.S. 523, 530 (1967). *See* the language used in District of Columbia v. Little, 178 F.2d 13, 16-17, *supra* note 3.

18. 387 U.S. 523, 531 (1967).

19. *Id.* at 534.

20. *Id.* at 538.

21. *Id.* at 539-40. The dissent in *Camara* seemed to think that the majority was imposing a *requirement* of a prior refusal of consent before a warrant based on the lesser probable cause standard could be issued for the inspection of a home. An indication that prior refusal of consent might have been intended as a constitutional requirement for inspection of homes is found in *See v. Seattle*, in which the Court said in a footnote:

> We do not decide whether warrants to inspect *business premises* may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

387 U.S. 541, 545, n.6 (1967) (emphasis added). Arguably, the Court's position was that a warrant based on the lesser probable cause standard

See v. Seattle[22] extended the *Camara* holding to area inspections of business premises. The Court there held that the owner of a locked commercial warehouse could not be prosecuted for refusing to allow a warrantless fire inspection of the interior of the building. Again, a flexible probable cause standard was approved:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.[23]

However, the Court specifically cautioned that it was not implying that business premises might not reasonably be inspected in many more situations than private homes nor questioning "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."[24]

See and *Camara* thus expressly rejected two major premises of the *Frank* opinion: that a warrantless search may meet the fourth amendment requirement of reasonableness if it is "civil" rather than "criminal" and that administrative inspections are "civil" searches. However, in distinguishing regulatory techniques such as licensing inspections from area inspections for code violations, the Court left the way open for the adoption of at least a narrow exception to the *See* rule.

The first inroad into the *See* rule occurred in 1970 in *Colonnade v. United States*[25] which involved a nonroutine inspection for a violation of the federal excise tax law. The inspection was initiated by a member of the Internal Revenue

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may sometimes be issued for inspection of business premises without prior refusal of consent, but ordinarily could not be for the inspection of homes. If this view is correct, any threat to the individual privacy of a householder occasioned by the relaxed standard of probable cause is greatly lessened.

22. 387 U.S. 541 (1967).

23. *Id.* at 545.

24. *Id.* at 546. Mr. Justice Clark, writing in dissent for four members of the Court, predicted that the *Camara* and *See* decisions would degrade the fourth amendment by resulting in "boxcar" or "paper" warrants, issued as a matter of course, with probable cause based on area inspection standards. He disagreed with the majority's conclusion that few occupants would refuse entry to inspect. The dissenters, apparently reading the "reasonableness" clause of the fourth amendment independently from the warrant clause, could see nothing unreasonable about inspections under "the carefully circumscribed requirements of health and safety codes." 387 U.S. 541, 548. *See* note 14 *supra.*

25. 397 U.S. 72 (1970).

Service's alcohol and tobacco tax division who, while a guest at a party at a catering establishment, had noticed a possible violation. When federal agents later visited the establishment, they were not permitted to enter the locked liquor storeroom. The agents broke the lock and entered, removing bottles suspected of being refilled in violation of federal law. Reasoning that the *See* rationale did not apply to an inspection of a licensed retail liquor dealer, the Court concluded that a warrant was not required before such an inspection. However, as the revenue statute specifically provided for the imposition of a fine for refusal to permit entry and did not authorize a forcible entry, the Court held that a fine was the exclusive sanction for such refusal. The evidence gained by the forcible entry was therefore suppressed. The dissent agreed with the majority's conclusion that no warrant was required but argued that the statute did permit a forcible entry. Perhaps because Mr. Justice Douglas, writing for the Court, emphasized the special treatment traditionally accorded to the liquor industry or because the evidence was in fact suppressed, *Colonnade* was not immediately seized on by the lower courts or commentators as evidence that the *See* warrant requirement was undergoing refinement.

The next year, however, *Wyman v. James*[26] indicated unmistakably that some members of the Court were uneasy with the implications of *See* and *Camara* and were willing to hold the cases to their facts. By the time *Wyman* was decided, both the membership and the perspective of the Court had changed drastically; with the exception of Mr. Justice White, who concurred in *Wyman*,[27] the members of the *Camara* majority who still remained on the Court composed the *Wyman* dissent.[28] The Court held in *Wyman* that a warrantless visit to the home of a welfare recipient, carried out under the carefully restricted provisions of New York law,[29] did not constitute a "search" within

26. 400 U.S. 309 (1971). *Wyman* has been the subject of much critical commentary. *See, e.g.*, 51 B.U.L. REV. 486 (1971); 48 DENVER L.J. 87 (1971); 85 HARV L. REV. 258 (1971); 69 MICH. L. REV. 1259 (1971); 66 NW. U.L. REV. 714 (1971); 17 N.Y.L.F. 856 (1971); 24 VAND. L. REV. 821 (1971).

27. Mr. Justice White, the author of the majority opinions in *Camara* and *See*, concurred in the judgment and joined with the majority opinion except for the portion which held the welfare visit not to be a search within the fourth amendment.

28. Justices Douglas, Marshall and Brennan, the other members of the *Camara* majority still on the Court, dissented in *Wyman*.

29. Mrs. James received written notice several days in advance of

the fourth amendment meaning of the term and that, even if it did possess some of the characteristics of a traditional search, it still met the fourth amendment requirement of reasonableness.[30] The particular visit at issue was a routine one, not based on a complaint or a suspicion of fraud. The majority opinion by Mr. Justice Blackmun stated that although the visit was perhaps investigative as well as rehabilitative, it nevertheless could not be equated with a search in the criminal law context. The Court distinguished *Camara* and *See* by noting that in both cases searches for criminal violations were involved, whereas in *Wyman* no criminal sanctions could be imposed; if the beneficiary's consent to the visit was not granted, aid would simply be denied. The Court thus partially reinstated the civil-criminal distinction of *Frank* without overruling *Camara* by redefining "criminal" to encompass the facts of both the *Frank* and *Camara* cases.[31]

Wyman can be explained as merely creating a new exception to the warrant requirement for the inspection of a welfare home, an exception similar to that which was arguably created for the inspection of a liquor retailer in *Colonnade*. There are, however, two more likely interpretations of the decision. First, the opinion may be viewed as removing the war-

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the visit, and the date of the visit was specified. In addition, section 134(a) of the New York Social Services Law provided:

> In accordance with regulations of the department, any investigation or reinvestigation of eligibility . . . shall be limited to those factors reasonably necessary to insure that expenditures shall be in accord with applicable provisions of this chapter and the rules of the board and regulations of the department and shall be conducted in such manner so as not to violate any civil right of the applicant or recipient. In making such investigation or reinvestigation, sources of information, other than public records, shall be consulted only with the permission of the applicant or recipient. However, if such permission is not granted by the applicant or recipient, the appropriate public welfare official may deny, suspend or discontinue public assistance or care until such time as he may be satisfied that such applicant or recipient is eligible therefor.

52A N.Y. Soc. Serv. Law § 134(a) (McKinney 1967), *as amended*, 52A N.Y. Soc. Serv. Law § 134(a) (McKinney 1973).

30. The *Wyman* opinion listed 11 factors which the Court believed indicated that the visit, even if a search, was not unreasonable, relying heavily on the "gentle means" by which the visit was undertaken and the state's interests in preventing misuse of public funds and protecting the dependent child from abuse. 400 U.S. 309, 318-24 (1971).

31. 400 U.S. 309, 325 (1971). *See* text accompanying note 17 *supra*. *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring), where a distinction is described between area searches which are essentially administrative and those which are "fishing expeditions" for evidence to support prosecutions.

rant requirement almost entirely in any case where no criminal sanctions are threatened for either a discovered violation or a refusal to permit entry. A search in such circumstances need only be reasonable. Second, the Court may be proceeding on a notion, akin to "implied consent,"[32] that beneficiaries of government programs must be prepared to fulfill reasonable conditions attached to their participation.[33]

In spite of the apparent dissatisfaction with *Camara* and *See* shown in *Wyman* and perhaps in *Colonnade*, it still seemed likely that the *Colonnade* rule would be restricted to liquor control and similar types of inspections, since both *Wyman* and *Colonnade* involved considerations which were at least in part quite different from those at issue in ordinary administrative inspections. *United States v. Biswell*,[34] the latest decision of the Court, made it clear, however, that the permissible scope of warrantless administrative searches would be expanded. In *Biswell* the Court held that a warrantless search of a locked firearms storeroom during business hours, authorized by the Gun Control Act of 1968,[35] did not violate the fourth amendment.[36] The Court determined that neither consent nor a warrant was necessary for such a search to be lawful:

> Respondent's submission to *lawful* authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence

32. *See* text accompanying note 76 *infra*.

33. This is how Justice Douglas, writing in dissent, interpreted the majority opinion. 400 U.S. 309, 326-28 (1971). If this interpretation is correct, the opinion may signal a nascent revival of the right-privilege distinction. *Cf.* Sherbert v. Verner, 374 U.S. 398, 404-06 (1963). This view is supported by a passage in the Court's opinion in which it compares the denial of welfare benefits based on a refusal to permit an inspection to a taxpayer's refusal to produce for review by an Internal Revenue Service agent proof of a deduction:

> [T]he taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.

400 U.S. 302, 324 (1971).

34. 406 U.S. 311 (1972).

35. 18 U.S.C. § 921 *et seq.* (1971).

36. The opinion reversed a decision of the Tenth Circuit holding that § 923(g) of the Gun Control Act of 1968 was unconstitutional because it authorized warrantless inspections, and that consent given to the inspection was invalid. 442 F.2d 1189 (10th Cir. 1971).

> in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. . . . In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.[37]

In justifying the creation of yet another exception to the warrant requirement, the Court emphasized the public interest in close scrutiny of interstate traffic in firearms and the crucial role that inspection plays in the regulatory scheme. Frequent and unannounced firearms inspections were necessary for effective enforcement, and the requirement of a warrant therefore might have frustrated the purpose of the search in *Biswell.* Thus the Court distinguished the fire inspection in *See,* where the conditions involved were by their nature difficult to conceal or correct in the short time needed to procure a warrant.[38] The Court also found that the *Biswell* search imposed only a limited intrusion on the dealer's justifiable expectations of privacy since he had chosen to engage in a pervasively regulated business and to accept a federal license.[39] Furthermore, firearms dealers are annually informed of both the purposes of the inspections and the limits of the inspectors' authority, so that a warrant would not be needed to provide this information. Despite the Court's emphasis upon the exigencies of firearms control, however, its holding was clearly not intended to be limited to firearms inspections:

> [W]here, as here, regulatory inspections further urgent federal interests and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.[40]

B. Analysis of the Warrant Requirement

Although the Court's opinion in *Camara* amounted to an almost total repudiation of both the premises and conclusions set forth in *Frank,* each case seemed to offer to administrators of agencies responsible for performing inspections some guidance as to how to proceed. The subsequent cases, however, demonstrated that the Court would no longer be satisfied with all-inclusive answers, preferring instead to move more slowly and

37. 406 U.S. 311, 315 (1972).

38. The Court also argued that if a warrant were required but the procedures for its procurement were permitted to be sufficiently flexible to meet the above objection, the warrant would provide little protection.

39. *Cf.* note 33 *supra.*

40. 406 U.S. 311, 317 (1972).

define what is required in one area at a time.[41] While this ap-

41. The Court has purported to use a balancing test throughout this series of cases, setting off the public interest in regulation against the individual's interest in privacy. *See* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973). Among the factors considered by the Court in the balancing process are:

1) *The history of acceptance of warrantless seraches.* This factor was relied on by the *Frank, Biswell* and *Colonnade* majorities and the *Camara* dissent. 359 U.S. 360, 367 (1959); 406 U.S. 311, 315 (1972); 397 U.S. 72, 76 (1970); 387 U.S. 541, 548 (1967) (Clark, J., dissenting). However, this factor alone is not persuasive, since administrative regulation today has expanded far beyond what it was even several decades ago.

2) *The significance of the public interest in regulation. See, e.g.*, United States v. Biswell, 406 U.S. 311, 315 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade v. United States, 397 U.S. 72, 76 (1970); Camara v. Municipal Court, 387 U.S. 523, 537 (1967); See v. Seattle, 387 U.S. 541, 550-51 (1967) (Clark, J., dissenting). The difficulty with this factor taken alone is that a strong case can be made for finding an overwhelming public interest in virtually every area that is currently regulated. Certainly, there is as great a public interest in deterring crime as in enforcing housing codes.

3) *The extent to which the warrant requirement would frustrate the purpose of the search. See, e.g.*, United States v. Biswell, 406 U.S. 311, 316 (1972). This depends partly on what the requirements for issuance of a warrant are. A warrant requirement that embodies a relaxed standard of probable cause may not frustrate the statutory purpose while a warrant that could be issued only on a showing of traditional probable cause might. The question to be asked is whether other means to satisfy the public interest which are not violative of individual privacy are available. United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969).

4) *The substantiality of the intrusion on a justifiable expectation of privacy. See* United States v. Biswell, 406 U.S. 311, 316 (1972). For example, a typical criminal search in which papers and personal belongings are closely examined often involves more of an intrusion on personal dignity and privacy than an area inspection for violations of the plumbing code, and a person engaging in unregulated or loosely-regulated commercial activities has a greater expectation of privacy than a person canning food or selling firearms. Another related consideration is the amount of protection a warrant would provide to individual privacy while still permitting effective regulation. United States v. Biswell, *supra*, at 316. For instance, there may be little protection to be gained by imposing a warrant requirement if a weakened probable cause standard would apply; surprise would be absolutely necessary in all cases; any information the warrant would provide to the occupants of the premises is already in his possession; and the circumstances under which inspection might take place are clearly defined in a statute. Of course, the phrase "justifiable expectation of privacy" should not be interpreted to mean that citizens need only be sufficiently warned that warrantless searches will take place to avoid a warrant requirement.

See also United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969), in which Judge Wisdom stated that to decide whether to enforce an Internal Revenue Service summons he was required to apply the analy-

proach undeniably produces confusion for administrative agencies, it may avoid a series of later overrulings. In spite of the present case-by-case approach, at least two generalizations can be drawn from the Court's opinions. First, more stringent safeguards of the citizen's privacy will be required where a municipal code inspection is involved than where a specific business activity is being regulated.[42] Second, a different standard will apply to "civil" as opposed to "criminal" searches; the citizen's privacy interest is given less weight where criminal prosecution is not anticipated.[43] At the same time, however, each of these generalizations may pose more questions than it answers.

Initially, it may be nearly impossible for an enforcing agency to determine with any precision whether it must secure a warrant prior to inspection, since *See* and *Biswell* are not easily distinguishable at a constitutional level. Given that the object of municipal housing and building code provisions is not in most instances *compliance,* however, a possible distinction may be drawn. In inspections under municipal building, health, safety and fire codes, if a delay to obtain a search warrant results in correction of a dangerous condition prior to the inspection, nothing is lost; in contrast, if such a delay allows a firearms dealer to dispose of a cache of illegal weapons, the statutory purpose is subverted. However, even this distinction is not always present. The distinction is blurred where, for example, building code provisions regarding maximum occupancy or placement of stored goods might easily be avoided by a temporary correction of the violation if advance notice of an inspection is given. The distinction is erased where in the *Biswell* situation the delay to obtain a search warrant can be avoided; after all, there was no suggestion in *See* that obtaining a search warrant must normally be delayed until the occupant has first refused to consent to an inspection.[44] Presumably, if a war-

sis of interests developed in *Camara* to the fact situation. The analysis used by Judge Wisdom requires a consideration of factors which are similar to those set forth above. The court in Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973), considered a similar set of factors.

42. *Cf.* United States v. Biswell, 406 U.S. 311 (1972); See v. Seattle, 387 U.S. 541 (1967). It is clear that the *Biswell* rationale for warrantless searches is applicable only to inspections of *business* premises, and cannot be used to justify inspections of homes or cars. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

43. *See, e.g.,* Wyman v. James, 400 U.S. 309 (1971).

44. *See* note 21 *supra.*

rant were to be required in the *Biswell* situation, the lesser probable cause standard articulated in *See* and *Camara* would apply so that obtaining a warrant would impose no insurmountable burden on the regulating agency. Thus, if an occupant need not be warned and a warrant is readily obtainable, the requirement of a warrant should no more frustrate the purpose of the search in *Biswell* than in *See*. On the other hand, as pointed out by the Court in *Biswell*,[45] there may be some differences in the extent of the protection of an individual's interest in privacy that a warrant would provide in the two situations. The operator of a store selling firearms is likely to be well-versed in the intricacies of the regulatory laws and the limits of the inspector's authority; a warrant would add little to his knowledge of his rights. In contrast, the warehouse owner in a case such as *See* cannot be expected to have much familiarity with the powers of inspectors under the municipal code, and a warrant delineating the limits of such powers might prove useful. The regulatory provisions in cases such as *Biswell* and *Colonnade* also tend to be more narrowly drawn than municipal codes, so that an abuse of authority is less likely. Although these differences might not seem sufficient to justify the Court's application of the fourth amendment's warrant requirement in one case and not in the other, the Court has not indicated that *Biswell* was intended to undercut *See*'s application to municipal code inspections.

Moreover, the Court's reliance on the presence or absence of criminal sanctions in evaluating the strength of a citizen's privacy interest has perhaps been misplaced, inasmuch as the distinction between criminal and civil sanctions is not always an accurate measure of the potential intrusiveness of the search. Some searches are intrinsically more objectionable than others: an armed, uniformed policeman who forcibly enters a home in the middle of the night and searches through the occupant's most personal papers and effects, perhaps even doing some physical damage to his property, presents a much greater threat to the fourth amendment privacy interest than does an unarmed inspector who at reasonable regular intervals appears at a place of business during daylight hours and requests admittance to the storeroom. Although the severity of the sanction might correlate with the intrusiveness of the search over a large number of cases, there is no reason to assume that

45. 406 U.S. 311, 316 (1972).

this will be so in any particular case. A result more attuned to the extent of the violation of privacy involved would be reached if the object and scope of the search, rather than just the potential sanction, were emphasized in deciding which warrantless searches are permissible.

The remainder of this Note will be divided into two parts. First, the constitutional warrant requirement will be discussed, focusing on the circumstances under which a warrant will ordinarily be required, the exceptions to the requirement of a warrant and the probable cause showing needed to obtain a warrant for an administrative inspection. Next, the Minnesota law of administrative search warrants will be reviewed, and changes in the present law suggested.

III. THE WARRANT REQUIREMENT

A. When a Warrant is Required

Since the Supreme Court has not yet provided an adequate standard for determining when warrants are required, any attempt to derive guidelines for application of the warrant requirement must be largely speculative. In particular, it is difficult to determine, first, under what circumstances a regulatory inspection of commercial premises falls under the rule of *Biswell* rather than *See*; and, second, whether a warrant will be required when the sanction threatened is more than the withholding of a government benefit as in *Wyman* but is still purely civil. Nevertheless, by applying the above decisions and those of the lower courts, it is possible to identify tentatively the situations in which warrants are required:

1. *Commercial premises—possible criminal sanction*

As noted earlier, enforcing agencies have had difficulty in deciding whether to follow *See* or *Biswell* in a particular inspection.[46] At least until the Court speaks again, they are left with the following principles. Where an industry or business is subject to pervasive governmental regulation, and where unannounced and frequent inspections are necessary, warrantless inspections are valid under *Biswell* if authorized by a narrowly-drawn statute that is sufficiently limited in time, place and scope.[47] On the other hand, where a statute is aimed at

46. *See* text accompanying note 44 *supra*.

47. Many of the Minnesota regulatory statutes which authorize

the physical condition and characteristics of a building rather than at a particular business activity, and where frequent surprise inspections are not necessary to ensure compliance with the statute, a warrant is required under *See*.[48] The more difficult determinations lie in the middle ground, either where regulation is aimed at a particular business, but the business is not one subject to the type of total regulation found in *Biswell*, or where there is a specific activity which is highly regu-

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warrantless inspections apply to businesses which are pervasively regulated; unless the *Biswell* and *Colonnade* rationale is limited to statutes concerning firearms and liquor, they are likely to be sustained if properly drawn. Although *Biswell* specifically refers to important federal interests, it is unlikely that the federal government would be permitted a greater intrusion on privacy than would state governments. At a minimum, warrantless inspections pursuant to laws regulating food and drugs should be permissible. However, the Minnesota statutes are generally not drawn with the narrow particularity that *Biswell* requires. For example, MINN. STAT. § 31.04 (1971) is a comprehensive provision allowing the Commissioner of Agriculture access to any place where any article of food which is regulated by state law is kept:

> [T]he Commissioner . . . shall have access to all places where any article of food, or other article, the manufacture, sale, use or transportation of which is now or hereafter restricted, regulated or prohibited . . . is or may be manufactured, prepared, stored, sold, used, transported . . . or had in possession with intent to use, sell or transport . . . and may take samples. . . . Any person obstructing such an entry or inspection, or failing upon request to assist therein shall be guilty of a misdemeanor.

The chapter includes a cryptic search warrant provision, which appears to apply only to seizures of food and not to the inspections themselves:

> The Commissioner may seize all food, the manufacture, transportation, sale or use of which is now or hereafter prohibited by law . . . and for this purpose he . . . shall have the powers of a constable. Such seizure may be made without a warrant, but in such case, as soon as practicable, he shall cause the person suspected of such violation of law to be arrested and prosecuted therefor. When necessary, a search warrant may be issued, as in the case of stolen property, the form of the complaint and of the warrant being adapted to the purposes of this section.

MINN. STAT. § 31.05 (1971). *See also* MINN. STAT. § 31.08 (1971), which allows the Commissioner access to any vehicle in which food is being transported within the state.

Other statutes provide specifically for inspections related to certain food products. So regulated are egg dealers, MINN. STAT. § 29.27 (1971); filled dairy products, MINN. STAT. § 32.532 (1971); horsemeat, MINN. STAT. § 31.631(3) (1971); and meat products, MINN. STAT. § 31A.25 (1971). Certain places where foods are held or processed are statutorily controlled. Examples include cold storage warehouses, MINN. STAT. § 28.05 (1971); canneries, MINN. STAT. § 31.31 (1971); and slaughterhouses, MINN. STAT. § 31.53 (1971). Most of these statutes provide for licensing but also include criminal penalties for violation.

48. Examples of Minnesota laws falling into this category are those authorizing building and fire inspections. *See* note 10 *supra*.

lated in many different and otherwise unregulated businesses.[49]

A very expansive view of *Biswell* and a correlative narrow view of *See* was taken by a federal district court in *United States v. Montrom*,[50] a case involving a narcotics law violation:

> . . . *See* extended the rationale of *Camara* to private non-dwelling premises used for otherwise unregulated purposes. . . .
> . . . *Biswell* makes it clear that the principles of *Colonnade Catering* are applicable to all professions in which there is a legitimate public interest in close regulation, as long as the statute authorizing inspection defines with fair specificity the allowable time, place and scope of such an inspection.[51]

Biswell was read even more broadly in *Youghiogheny and Ohio Coal Co. v. Morton*,[52] a case under the Federal Coal Mine Health and Safety Act of 1969,[53] where the court stated that "an exception to the warrants requirement is now established where statutory regulation of businesses, pursuant to the government's police power, mandates warrantless entry."[54] The court went on to note that in the fourth amendment area the congressional determination was entitled to great weight, and as there was some basis for Congress' approach, the court would not second-guess its determination. Although a qualifying footnote stated that the court's view might be different if the search was not in a business context of an inherently dangerous type,[55] the narrow scope of review suggested by the

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49. An example of this type of regulation is a statute controlling pollution. Although aimed at a certain activity, *i.e.*, the emission of air and water pollutants, the standards apply across the board to many different kinds of commercial establishments. MINN. STAT. § 115.04(3) (Supp. I, 1973) provides:

> *Access to premises*: Whenever it shall be necessary for the purposes of chapter 115 and . . . chapter 116, the agency, or any member . . . upon presentation of credentials, may enter upon any property, public or private for the purpose of obtaining information or examination of records or conducting surveys or investigations.

At least one court has held that air pollution inspections undertaken without warrant, notice or consent violate the fourth amendment. Western Alfalfa Corp. v. Air Pollution Variance Bd., 510 P.2d 907 (Col. Ct. App. 1973), *petition for cert. filed*, 42 U.S.L.W. 3322 (U.S. Oct. 24, 1973) (No. 690).

50. 345 F. Supp. 1337 (E.D. Pa. 1972).

51. *Id.* at 1339.

52. 364 F. Supp. 45 (S.D. Ohio 1973).

53. 30 U.S.C. § 801 *et seq.* (1970).

54. Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 49 (S.D. Ohio 1973).

55. *Id.* at 52 n.7.

court is notable.[56] If this interpretation of *Biswell* is accurate, it is possible that *See* will eventually apply only to municipal building, health, safety and fire code inspections. However, it is also possible that finer distinctions, such as that suggested earlier between routine and nonroutine inspections, will in time be adopted for cases that do not fall clearly under either *See* or *Biswell*. The lower courts to date have applied *Biswell* to inspections for violations of laws regulating food, drugs, motor vehicle inspection stations and mining operations.[57]

In those situations in which a warrant is not required, at least two restrictions remain: a warrantless inspection system which includes criminal penalties must be "carefully limited in time, place and scope,"[58] and the inspection itself must comply with the authorizing statute and be reasonable. The first restriction results in few problems. Although *Biswell* did not provide any criteria for assessing the validity of an inspection system, the Gun Control Act of 1968[59] authorized entry into the premises of any firearms dealer only during business hours and for the purpose of inspecting any records or documents kept under the Act and any firearms or ammunition

56. This deference to Congress was also suggested by the dissent in Almeida-Sanchez v. United States, 413 U.S. 266, 293 (1973) (White, J., dissenting).

57. *See, e.g.*, Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972); United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972), *aff'd mem.*, 480 F.2d 918 (3d Cir. 1973); People v. Terraciano, 39 App. Div. 2d 1005, 333 N.Y.S.2d 903 (1972). The habeas corpus petition of the defendant in the latter case was granted in Terraciano v. Montagne, 360 F. Supp. 1377 (W.D.N.Y. 1973). *Cf.* United States v. Litvin, 353 F. Supp. 1333 (D.D.C. 1973), which found that no warrant was required for an inspection, but that under the provisions of the Federal Food, Drug and Cosmetic Act the only remedy for refusal of entry was to seek prosecution for the refusal. In *Del Campo*, the court stated that the *Biswell* Court distinguished *See*, which "apparently holds that some administrative inspections are still subject to the Fourth Amendment warrant requirements if the conditions to be inspected are such that they could not be remedied in a short period of time"; the court found this time limitation to be "nebulous" but held that it was in any event irrelevant in the instant case because unannounced inspections were essential. 345 F. Supp. 1371 n.12. Although this is not an adequate interpretation of the distinction between *Biswell* and *See*, it points up the failure of the Supreme Court to articulate the distinction so that it could be understood by the lower courts.

58. United States v. Biswell, 406 U.S. 311, 315 (1972). *See also* United States v. Montrom, 345 F. Supp. 1337 (1972), *aff'd mem.*, 480 F.2d 918 (3d Cir. 1973).

59. 18 U.S.C. § 921 *et seq.* (1970).

kept on the premises. Presumably, then, a statute which both limits warrantless inspections to business hours and premises and defines carefully what can be inspected is valid.[60]

The difficulty in complying with the second restriction lies in determining what has in fact been authorized by the statute. It has been argued that even where a warrantless inspection is authorized by a valid statute the inspector is not authorized to to enter the premises without the consent of the occupant if the statute provides a specific sanction for refusal of entry. Rather, the inspecting agency is limited to charging the occupant with a violation of the entry refusal provision of the statute. This argument, set forth in *United States v. Litvin*,[61] is based on the difference in the statutes at issue in the *Biswell* and *Colonnade* cases. In *Colonnade* a specific sanction (equal to the sanction for any other violation) was provided in the statute for refusal of entry to an inspector.[62] In *Biswell*, on the other hand, there was only a general penalty clause which might not have been applicable in the case of a refusal of entry.[63] From this statutory difference the *Litvin* court concluded that a forcible, that is, a nonconsensual, entry is permissible where no specific remedy for entry refusal is in the statute but not where such an alternative is expressly provided.

This conclusion is certainly a plausible explanation for the different results in the two cases[64] because it must be

60. A statute permitting "access at all times" was held in Terraciano v. Montayne, 360 F. Supp. 1377 (W.D.N.Y. 1973), to be insufficiently limited to permit warrantless inspection, the court stating that the inspection would have otherwise been permissible. However the Federal Food, Drug & Cosmetic Act, under which warrantless inspections have been permitted (*see* note 57 *supra*) permits inspections "within reasonable limits" and "at reasonable times"—hardly helpful limitations. 21 U.S.C. § 374 (1970).

61. 353 F. Supp. 1333 (D.D.C. 1973).

62. The statute at issue in *Colonnade* provides:

> Any owner of any building, or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 or refuses to permit him to examine such article or articles, shall, for every refusal, forfeit $500.

26 U.S.C. § 7342 (1970).

63. The general penalty statute in *Biswell* provides sanctions up to 10 years imprisonment and $10,000 in fines for violations of the Gun Control Act. However, a penalty for refusing entry to inspectors is not listed. 18 U.S.C. § 924 (1970).

64. A non-consensual entry was allowed in *Biswell*, but not in *Colonnade*, though a warrantless search was held to be valid in both

presumed that by giving government agents a means of enforcing the right of entry Congress intended to authorize entry. However, it relies on what may be an accidental difference between the statutes. In addition, if this distinction was in fact determinative in *Biswell*, it is likely that the Court would have stated so expressly. Another possible explanation for the different outcomes in *Biswell* and *Colonnade* is that the Court was distinguishing between an entry made over the *protest* of an occupant, either by physical force or otherwise, and one based simply on what would be inadequate consent if a warrant were otherwise required for the search. This distinction is never made in the criminal context; there, a submission to a show of authority is insufficient to validate a warrantless search. In the present context, however, an otherwise inadequate consent is being used to justify only a forcible entry and not a warrantless search. Thus, although Congress might not have authorized a forcible entry, it is arguable that stepping aside in submission to lawful authority is all that is required to render an entry legal.

2. *Commercial premises—no criminal sanction*

Since no warrant is required for an inspection authorized by a valid statute in an area of pervasive government regulation even if a criminal penalty is provided, no warrant is required if the only available sanction is civil. For example, where a particular business activity is highly regulated and the only sanction is revocation of a license, no warrant should be required if the statute is sufficiently narrow. Where the business is not one subject to such regulation, it is not clear whether a warrant would be required, as it would be if there were criminal sanctions. Several cases seem to suggest a warrant is not required in such circumstances. For example, in *Portnoy v. McNamara*[65] an ordinance authorizing the warrantless inspection of a bailbondsman's books and records was upheld by the Oregon Court of Appeals because no criminal prosecution was involved. Similarly, the Pennsylvania Real Estate Commission

cases. Although *Colonnade* involved the use of physical force, while *Biswell* involved the absence of knowledgeable consent, the court in *Litvin* considered both to be forcible. (In United States v. Ciaccio, 356 F. Supp. 1373 (D. Md. 1972), it was held that a warrant could be obtained for a *Colonnade* type inspection on a showing less than probable cause; this would permit a forcible entry to inspect rather than simply a prosecution for refusal of entry. *See* note 122 *infra*.)

65. 8 Ore. App. 15, 493 P.2d 63 (1972).

was held in *State Real Estate Commission v. Roberts*[66] to be authorized to suspend the license of a broker who refused to permit a Commission investigator to conduct a warrantless inspection of his escrow account.[67] If these cases are correct, perhaps a warrant might not be necessary even in a building or fire inspection program such as that in *See* if only civil sanctions are available. However, the cases might simply be holding that sufficient government regulation existed to justify the imposition of civil sanctions for refusal of a warrantless inspection.

3. *Noncommercial premises—possible criminal sanction*

Here, under *Camara*, a warrant is always required. Even if, as in *Frank* and *Camara*, no criminal prosecution will ensue unless the occupant refuses to obey an order to correct a discovered violation, a warrant must be issued.[68]

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66. 441 Pa. 159, 271 A.2d 246 (1970), *cert. denied*, 402 U.S. 905 (1971).

67. Because the extent of regulation of the activities involved in each of these cases is hardly comparable to the regulation of commodities such as firearms and liquor and the sanctions imposed were severe, these decisions are subject to question.

68. A substantial number of Minnesota statutes and ordinances authorize inspections which may fall under the *Camara* rule. For example, MINN. STAT. § 299F.09 (1971) provides authorization for the state fire marshall and his representatives and certain local officials to enter on all premises:

> *Buildings, Entered Within Reasonable Hours*: The fire marshall, his chief assistant, deputies, and subordinates, the chief of the fire department of each city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a town in territory without the limits of a city or village, at all reasonable hours may enter into all buildings and upon all premises within their jurisdiction for the purpose of examination.

The fact that the statute does not expressly require a warrant does not of itself lead to invalidity: "the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect." Camara v. Municipal Court, 387 U.S. 523, 540 (1967). However, unless a search warrant is obtained, the law cannot be enforced in its entirety against unwilling occupants of premises to be inspected.

Other Minnesota statutes permit warrantless inspections of private vehicles which may or may not come under the *Camara* rule. For instance, MINN. STAT. § 84.51 requires any airplane entering a wilderness area to report at a checking station. While landed, the aircraft may be inspected:

> *Inspection.* Every aircraft while landed at a checking station to report as herein provided shall be subject to inspection by the commissioner of natural resources or his authorized

4. *Noncommercial premises—no criminal sanction*

a) Welfare home visits

A warrantless visit to the home of a welfare recipient is permissible under *Wyman* if it is otherwise reasonable under the fourth amendment. In *Wyman* the Court indicated that not all such visits would be considered reasonable:

> Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances.

> agents, or by any conservation officer, any of whom may, without a warrant, examine and search such aircraft for wild animals illegally taken or possessed or for other things declared contraband by the laws relating to wild animals, and may seize and confiscate in the name of the state any such contraband which may thereupon be found.

MINN. STAT. § 84.51 (1971). Although the law is drawn in a suitably narrow fashion (apparently, no contraband not relating to wild animals may be the object of the search or seizure), its validity may nevertheless be questioned under *Camara*. It may be argued that the exception to the warrant requirement for criminal searches of a vehicle, based on the ease of removal, applies here. However, any vehicle search is a highly intrusive one, and perhaps the exception should not be carried over to administrative searches where only the lesser standard of probable cause is required. The section may also be upheld on an implied consent theory, *i.e.*, that by entering this restricted area, the pilot and passengers of the plane agreed to the inspection. On balance, it is highly unlikely that a warrant requirement would be imposed by the Court because such a requirement would be entirely impracticable for the aircraft inspections in question and would completely frustrate the purpose of the search.

A similar provision allows any officer to inspect any vehicle carrying decorative trees:

> *Decorative Trees.* . . . Any . . . officer shall have power to inspect any such decorative trees when being transported in any vehicle or other means of conveyance or by common carrier, and to make such investigation with reference thereto as may be necessary to determine whether or not the provisions . . . have been complied with, and to stop any vehicle or other means of conveyance found carrying any such decorative trees upon any public highways of this state, for the purpose of making such inspection and investigation, and to seize and hold subject to the order of the court any such decorative trees found being cut, removed or transported in violation of any provision of sections 88.641 to 88.649.

MINN. STAT. § 88.642 (1971). This statute has a built-in search warrant provision:

> *Enforcement. Subdivision 1.* Any court or magistrate having authority to issue warrants in criminal cases may issue a search warrant, in the manner provided by law for issuing search warrants for stolen property, to search for and seize any trees alleged upon sufficient grounds to have been affected by or involved in any offense under sections 88.641 to 88.647.

MINN. STAT. § 88.645 (1971). However, no warrants are authorized for purely routine inspections.

> The early morning mass raid upon homes of welfare recipients is not unknown.[69]

It may be inferred from the *Wyman* opinion that a welfare visit, to be reasonable, should ordinarily occur during business hours and with prior notice.[70]

b) Withholding of government benefit or civil sanction

There has been no clear answer to the questions whether a government can condition the receipt of some benefit, for example, municipal services, upon the beneficiary's consent to warrantless inspections or can impose another civil sanction, such as a fine, for the failure to permit inspection. Any answer must be extrapolated from the Court's treatment of the facts in *Wyman*, for that case involved the unique government benefit of welfare payments. If *Wyman* merely establishes a new exception to the fourth amendment's warrant requirement for welfare home visits,[71] a warrant probably is required in other situations because the reasoning of *Camara* makes the legality of the search hinge not upon the potential sanction but rather upon the extent of the intrusion. Presumably the inspection of a private home represents an intrusion sufficient to require a warrant, for absent the special considerations in *Wyman* a homeowner's reasonable expectation of privacy is great. However if, as is more likely, *Wyman* either removed the warrant requirement completely in cases where no criminal sanctions are involved or held that the government could attach reasonable conditions to the benefits it dispenses, a different conclusion might be reached. If the former is the correct interpretation, then no warrant is required, and the validity of a search depends only on its reasonableness. If the latter interpretation is correct, whether the government may insist on a warrantless search as a prerequisite to the granting of benefits should depend not only on the reasonableness of the search but also on the relationship between the benefits and the inspection. Under this analysis, since a welfare home visit is closely related to determining the need for welfare benefits, it would be permissible for the government to cease the payments if the visit were refused. However, a municipality would probably not be permitted to enforce its housing code

69. Wyman v. James, 400 U.S. 309, 326 (1971).
70. *See* text accompanying note 33 *supra*.
71. *Wyman* also held that the visit was not itself a search. 403 U.S. 309, 318 (1971).

by turning off, or refusing to turn on, the water supply because consent to a warrantless inspection of the entire premises had not been given.[72]

A municipal code provision providing a civil sanction for failure to permit inspection of noncommercial premises was upheld by the Fifth Circuit in *Harkey v. deWetter*.[73] Warrantless inspections of the nondwelling portions of the premises of animal owners were authorized by the El Paso Code of Ordinances. Failure to admit an inspector could result in revocation or nonissuance of a permit to keep animals and in the impoundment of the animals. The court held that such inspections did not fall under the *Camara* and *See* rules and were reasonable under the fourth amendment. Even if the *Harkey* decision was correct in holding that no warrant is required for searches of noncommercial premises where criminal sanctions are not threatened, it may be necessary, in a case where the search is of the dwelling portion of the premises, at least to give the resident advance notice of the inspection in order for it to be reasonable.

B. Exceptions to the Warrant Requirement

1. *Consent*

A search which normally requires a warrant may be made without a warrant if consent is obtained.[74] The most impor-

72. *See* Nelson, *Building, Health and Housing Code Inspection in Missouri: A Need for Legislation*, 27 J. Mo. Bar 572 (1971), in which this approach is suggested. Conditioning such benefits on inspection may be constitutionally suspect; *see* note 79 *infra*. However, in John D. Neumann Properties v. District of Columbia Bd. of Appeals and Review, 268 A.2d 605 (D.C. Ct. App. 1970), conditioning a license to operate a multiple dwelling on inspection was upheld, the court relying on a theory of implied consent (*see* note 77 *infra*).

73. 443 F.2d 828 (5th Cir.), *cert. denied*, 404 U.S. 858 (1971).

74. If absent consent a search and seizure would be unreasonable, consent must be obtained from the person whose rights are otherwise to be invaded or from someone with express authority to act for the affected person in his absence. Edelman, *Search Warrants and Sanitation Inspections—The New Look in Enforcement*, 45 Denver L.J. 296 (1968). Thus, generally a tenant can give consent to a search for the part of the premises occupied by him, while the landlord cannot. In addition, a person having equal rights in a space may consent to a search in which the evidence will be used against a joint occupant of the premises. In business regulation inspections the question often arises whether an employee was acting within the scope of his authority in consenting to the inspection. *See* Edelman, *supra*; Note, *Third Party Consent to Search and Seizure*, 1967 Wash. U.L.Q. 12, 29; Note, *The Law of Administrative Inspections: Are Camara and See Still Alive*

tant issues regarding consent to administrative inspections are, first, the extent to which a government may successfully claim that the acceptance of a license to do business constitutes "implied consent" to a warrantless search authorized by the licensing statute and, second, whether consent to an administrative search, like consent to a traditional criminal search, must be a "knowledgeable waiver of constitutional rights."[75]

a) Implied consent

In the case of regulation of businesses, the justification of warrantless inspections is often premised upon the theory that by accepting a license the licensee has consented to those searches that are part of the statutory scheme. The *See* Court recognized this rationale implicitly:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections *prior* to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness.[76]

This statement should not be taken to mean that implied consent via licensing will automatically validate a search which otherwise would be impermissible under the fourth amendment, because the requirement of such consent as a condition to granting a license may itself be unreasonable. Rather, the issuance of a license should ordinarily be considered to give the governmental body no more authority to search without a warrant than it would have through any other suitable regulatory measure with a warrantless inspection provision.[77]

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and Well?, 1972 WASH. U.L.Q. 313. MINNEAPOLIS CODE OF ORDINANCES § 67.020, note 9 *supra*, permits housing inspections after consent is obtained from the occupant of the premises.

75. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968).

76. 387 U.S. 541, 545-46 (emphasis added). There is some question as to whether the Court intended to limit inspection authority in connection with licenses to only inspections *prior* to licensing. In People v. White, 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (App. Dept. Super. Ct. L. A. 1968), the court rejected the argument that warrantless inspections may no longer be made once a license is granted, stating that this is when the real need for inspection arises. *See also* Greenberg, *The Balance of Interests Theory and The Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973).

77. In Kansas v. Dailey, 209 Kan. 707, 498 P.2d 614 (1972), a warrantless entry and search by peace officers searching for gambling violations under the Private Clubs Act was approved as being within the

Thus, although both *Biswell* and *Colonnade* arose under licensing statutes, their holdings are not dependent on the existence of a licensing scheme. In a prosecution for violation of the Federal Food, Drug and Cosmetic Act the federal district court in *United States v. Del Campo Banking Manufacturing Co.*[78] refused to suppress evidence obtained during inspection of a bakery, stating:

> [D]efendants contend, however, that the *Biswell* decision is inapplicable to the present case because the Del Campo businesses are not federally licensed . . . . The *Biswell* decision is not to be so narrowly construed. . . .[79]
>
> . . . .
>
> The fact that Congress has not required the Del Campo business to obtain federal licenses to operate is wholly immaterial. . . . No rational or valid distinction can be drawn for compliance inspections between a federally licensed business and one so completely regulated by the act. . . .[80]

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rule of *Biswell;* the statute provided that acceptance of a license was conclusive consent to immediate entry and inspection. The dissent argued that such a search was not reasonable:

> Were we to hold that in every instance in which a license may lawfully be required its granting may at the same time be conditional upon a waiver of constitutional rights against unreasonable search, what area could conceivably remain immune and beyond legislative reach, upon which the constitutional guaranty might still operate?

Id. at 629.

There are several other cases in which an implied consent rationale was explicitly used. For example, in State Real Estate Comm'r v. Roberts, 441 Pa. 159, 271 A.2d 246 (1970), *cert. denied*, 402 U.S. 905 (1971), the court stated that *See* was not applicable whenever an individual voluntarily enters a field which requires licensing by the state and thus upheld a statute which authorized suspension of the license of a broker who refused to permit warrantless inspections of his escrow account. Here, of course, it is questionable whether *See* would apply in any event because of the nature of the inspection and the sanctions. *See* text accompanying note 66 *supra.* In People v. White, 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (App. Dept. Super. Ct. L.A. 1968), the conviction of the defendant for operating a licensed nursing home without a person on duty during the day was upheld against a challenge to a routine inspection, the court holding that acceptance of a license was implied consent to supervision and inspection required by the licensing statute. Similarly, in John D. Neumann Properties, Inc. v. District of Columbia Bd. of Appeals and Review, 268 A.2d 605 (D.C. Ct. App. 1970), the petitioner was held to have consented to an inspection of his multiple dwelling structure by his application for a license to operate it as an apartment house. The rationale of implied consent was superfluous in that case since the *See* opinion expressly excluded inspections prior to granting a license (*see* text accompanying note 24 *supra*) and since, in any event, consent to enter the common areas as well as the individual units granted by the tenants should have been sufficient. *See* note 74 *supra.*

78. 345 F. Supp. 1371 (D. Del. 1972).

79. *Id.* at 1376.

80. *Id.* at 1377.

The chief advantage of licensing, then, is not that a greater degree of regulation can be undertaken but rather that an effective, easily-administered noncriminal sanction is present in license revocation.[81]

Although most of the licensing cases which have arisen under the fourth amendment have involved businesses, the rationale is not so limited. In *Harkey v. deWetter*[82] the Fifth Circuit, in upholding a city ordinance which provided that the acceptance of a permit to have animals constituted consent to inspection of all parts of the premises except the part used for human dwelling, found *Camara* inapposite because a home was not involved. The court appeared to interpret the statement in *See* approving licensing schemes[83] to mean that any time a licensing program is involved, no warrant is required as long as the program is reasonable. So interpreted, the holding of *See* could easily be undermined simply by requiring consent to routine municipal code inspections as a condition to obtaining either a license to do business or a certificate of occupancy of a commercial building and then imposing a criminal penalty for failure to permit inspection. However, the actual decision in *Harkey* may not have been inconsistent with the Supreme Court cases since no criminal penalty was provided by the city ordinance.

b) Knowledgeable consent

Where warrantless searches for evidence of a crime have

81. A serious problem with the "implied consent" approach is that it suggests the possibility that an unconstitutional condition may be imposed. *See, e.g.*, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Sherbert v. Verner, 374 U.S. 398, 404-06 (1963). Mr. Justice Douglas, dissenting in *Wyman*, suggested that conditioning receipt of welfare payments on access to the recipient's house might be an unconstitutional condition. "[T]he central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution." 400 U.S. 309, 328. He then compared the *Wyman* situation to that of a business licensee: "There is not the slightest hint in *See* that the Government could condition a business license on the 'consent' of the licensee to the administrative searches we held violated the Fourth Amendment." 400 U.S. 309, 331. Even if *Wyman* does in effect restore in part the right-privilege distinction which allowed the government to condition privileges, although not rights, on waiver of constitutional rights, a license can probably not be conditioned on an inspection which would, absent the license, be considered unreasonable under the fourth amendment; thus a license should be permitted to be conditioned on consent to an inspection like that in *Biswell*, but not to an inspection like that in *See*.

82. 443 F.2d 828 (5th Cir.), *cert. denied*, 404 U.S. 858 (1971).

83. *See* text accompanying note 76 *supra*.

been undertaken, the courts have been reluctant to find a waiver of fourth amendment rights in a consent given by a householder, relying either on the citizen's probable lack of knowledge of his rights or on the inherent coercion resulting from the appearance of an armed policeman at his door. In *Bumper v. North Carolina*[84] the Supreme Court stated:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.[85]

A series of lower court cases arising since *Camara* and *See* indicates that this body of law surrounding consent to criminal searches will not be automatically applied to administrative inspections. For example, in *United States v. Thriftimart*[86] the defendants charged that they had not given an effective consent to entry by Food and Drug Administration inspectors since they had not been informed of their right to insist upon a warrant. The Ninth Circuit held that because of the differences in purpose and scope between a criminal search and an administrative inspection, a warrantless inspection of business premises is reasonable where the occupant has manifested consent and the inspector has not resorted to force or misrepresentation. *Thriftimart* has been followed by several courts, usually in the context of inspections under the Federal Food, Drug and Cosmetic Act.[87] In addition, two New York cases have held that a citizen need not know his fourth amendment rights to consent effectively to a warrantless inspection of his home.[88]

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84. 391 U.S. 543 (1968).

85. *Id.* at 548-49.

86. 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *reh. denied*, 400 U.S. 1002 (1971).

87. United States v. Robson, 477 F.2d 13 (9th Cir. 1973); United States v. Alfred M. Lewis Co., 431 F.2d 303 (9th Cir.), *cert. denied*, 400 U.S. 878 (1970); United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970); United States v. Kendall Co., 324 F. Supp. 628 (D. Mass. 1971). *Cf.* United States v. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969), in which the inspector asserted that he had authority to inspect without a warrant and led the defendant to believe that he was subject to prosecution if he objected. Although the court held defendant's acquiescence not to constitute a valid consent, it stated it was not holding that inspectors were required to affirmatively advise owners of premises of their right not to submit to a warrantless inspection.

88. Oilan v. Yee Loy Loong, 69 Misc. 2d 108, 329 N.Y.S.2d 531 (N.Y. Civil Ct. 1972); Sandflow Realty Corp. v. Diaz, 64 Misc. 2d 625, 315 N.Y.S.2d 487 (1970).

There are several considerations which suggest that the full safeguards of the criminal search consent standards are not necessary in administrative inspections. A criminal search, which is often performed by an armed officer, involves an element of apparent coercion not usually present in an administrative inspection. While consent is often said to be suspect in a criminal search, it is expected in an administrative inspection.[89] In addition, an administrative inspection is less intensive and more limited in scope than a criminal search because it generally does not involve sifting through personal effects. The stigma or injury to reputation that may result from a criminal search is not likely to occur in the context of an administrative inspection, especially an area inspection, since the inspection is not personal in nature.[90] Notwithstanding these considerations, there are several tenable arguments that criminal search consent standards should apply to administrative inspections as well. A knowledgeable person should not be the only one able to take advantage of his fourth amendment rights, and it is inconsistent to state that a warrant is required to protect the citizen and at the same time not require that the citizen be informed of his right to demand a warrant.[91] Moreover, even if knowledgeable consent is technically to be required, obligating inspectors to give a Miranda-type warning does not ensure that the occupants of the inspected premises do in fact have that knowledge. In the typical criminal search, the citizen is substantially protected by an exclusionary rule; in contrast, those administrative inspections which require warrants after *Biswell* do not generally result in prosecution, so that such a rule would not be effective. The citizen's right to privacy is at stake, and it is violated whenever an inspection occurs, not just in the unlikely event that the results of the inspection are used in a criminal proceeding. Since the occupant is not likely to object on his own to a failure to give a warning, some inspectors might be tempted to risk later invalidation of the inspection by not telling the occupant that a warrant would be required if he did not choose to consent.

89. *See* United States v. Thriftimart, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *reh. denied*, 400 U.S. 1002 (1971).

90. La Fave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

91. In United States v. Roundtree, 420 F.2d 845, 849-50 n.8 (5th Cir. 1969), Judge Wisdom said that under some circumstances "a colorable argument can be made that certain warnings . . . are necessary in order to ensure that the waiver of constitutional rights is voluntary and intelligent" when consent to inspections is given.

2. *Emergency*

The *Camara* Court did not question the long-recognized exception to the warrant requirement for searches which are required to take place immediately because of an "emergency" or a situation of "compelling necessity":

> Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.[92]

Warrantless emergency searches have been validated where allegedly unfit poultry was seized,[93] where treasury agents entered on the property of a firearms dealer who had positioned a cannon near a place by which the President of the United States would pass[94] and even where a foul odor emanated from a student's briefcase left in the school library.[95] The emergency exception, although perhaps useful in times of public danger from, for example, a contaminated food or water supply, will almost certainly not be expanded much beyond its presently narrow limits; it will probably remain necessary to show "an imminent and substantial threat to life, health, or property."[96] In the type of administrative inspection which would normally require a warrant, it would rarely be so important to take immediate action that a warrantless search could be justified on the basis of an emergency.[97]

C. THE PROBABLE CAUSE STANDARD

The *Camara* probable cause standard requires only that reasonable administrative or legislative standards for an area inspection be satisfied:

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92. Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

93. North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

94. Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967).

95. People v. Lanthier, 5 Cal. 3d 751, 488 P.2d 625, 97 Cal. Rptr. 297 (1971). *Cf.* People v. Smith, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972) (necessity not shown when six-year-old left alone in apartment); Condon v. People, 489 P.2d 1297 (Colo. 1971) (odor of decomposing body which police thought was coming from basement of house did not give rise to emergency permitting invasion of home without search warrant).

96. People v. Smith, 7 Cal. 3d 282, 287, 496 P.2d 1261, 1264, 101 Cal. Rptr. 893, 896 (1972).

97. The Minneapolis Code permits housing inspections without consent or a warrant in cases of emergencies, but requires an immediate report to the City Council whenever such action is taken. The Council at its next meeting is then required to affirm or overrule the declaration of emergency. MPLS. CODE OF ORDINANCES § 67.050 (1971).

> Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house) or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[98]

As pointed out by the dissent in *Camara*,[99] the danger in such a lessened probable cause requirement is that "synthetic" search warrants will issue, with the magistrates making no independent judicial appraisal of the merits of the inspection. Nevertheless, once the Court committed itself to requiring warrants for some types of administrative inspections, there was some justification for a lesser standard. The purpose of an area housing inspection, for example, is to detect problems before they become apparent to the public and while they may still be easily remedied. To require that inspection be delayed until violations are readily observable from the outside—and the traditional probable cause standard is therefore met—would perhaps postpone it until a time when it could no longer serve this function. In contrast, criminal searches generally arise because of *public* conduct which makes other methods of detection possible.[100] In addition, criminal searches are directed at only a very small segment of the population, so that fulfilling strict requirements for warrants does not make it impractical to carry out the searches. Since the premise of an area housing or building inspection is that every structure in the municipality, or certain parts of it, must be inspected, to require that warrants be obtained based on the traditional probable cause standard would probably destroy the program.

Presumably, to show probable cause under the *Camara* standard for an area inspection the inspector would have to describe the agency's standards for inspection (for example, each structure in a certain area is to be inspected every five years), allege that those standards are reasonable and provide any other information available on the condition of the building or the general area.[101] The *Camara* standard would probably be satisfied in virtually any case where the building had not been inspected for a long period of time.

The Court has never dealt with the probable cause standard required for periodic inspections of regulated businesses

98. Camara v. Municipal Court, 387 U.S. 523, 538 (1967).
99. *Id.* at 548.
100. LaFave, *supra* note 90, at 19.
101. *Id. See also* WIS. STAT. ANN. § 66.123 (Supp. 1973) (*Special Inspection Warrant Forms*).

which are not so pervasively regulated that they fall under *Biswell*, if in fact there is such a category.[102] It can probably be assumed, however, that no greater showing would be required here than in cases of area inspections of buildings. Both are routine inspections not directed at obtaining evidence for use in criminal prosecution, and the expectation of privacy of the occupant of business premises is presumably less than that of the occupant of a noncommercial building.

Camara left in doubt whether it would be constitutionally permissible to issue block or area warrants, that is, warrants which authorize several distinct searches. It now appears from language in the recent case of *Almeida-Sanchez v. United States*[103] that such warrants will be upheld by the Court when the issue is presented. *Almeida-Sanchez* involved a warrantless search of an automobile by a roving border patrol 25 miles north of the Mexican border. The search was held to violate the fourth amendment by a divided court; however, Justice Powell in his concurring opinion and the four dissenters agreed that an area warrant procedure would be permissible.[104] A footnote in the majority opinion stated that the Justices joining that opinion were divided on the question of the constitutionality of area search warrants.[105] Although developing a warrant procedure for roving border inspections is more difficult than in the case of typical administrative inspections because automobiles are involved, it seems likely that at least a majority of the Court would approve area warrants in other contexts.

Although the revised probable cause standard in *Camara* referred only to area inspections, its balancing approach might result in a lesser standard for some types of complaint inspections as well. For example, it is possible that fewer facts would have to be documented to obtain a complaint inspection warrant than to obtain a warrant for a typical criminal search. A phone call or note from a neighbor, suitably verified, would probably be sufficient; even an anonymous phone call might suffice if other evidence regarding the building or the activity regulated were gathered. However, the danger that local officials might harass unpopular individuals, a danger which is not as imposing when every building in a certain area

102. *See* text accompanying note 49 *supra*.
103. 413 U.S. 266 (1973).
104. *Id.* at 283 (Powell, J., concurring), 288 (White, J., dissenting).
105. *Id.* at 270.

or every business engaged in a certain activity is being inspected, suggests that presentation of some evidence of a specific violation should be required before a complaint inspection warrant is issued. In addition, at least where an agency contemplates particularly intrusive inspections or inspections which involve lengthy investigations or the possibility of collaboration with law enforcement officials,[106] a showing of cause more congruent with that required for traditional criminal searches should be demanded.

D. A Suggested Approach

The questions of whether a warrant must be obtained for a particular type of inspection and what kind of showing is required prior to the issuance of a valid warrant are not entirely separable. Inasmuch as the ultimate standard is reasonableness, the burden that a warrant requirement would impose on the government is a factor to be considered in deciding whether a warrant is required; and the dimensions of that burden are, of course, dependent on what must be done in order to obtain a warrant. An illustration of this proposition may be seen in the fact that the *Camara* Court, in requiring a lesser standard of probable cause to obtain a warrant, relied on the same factors the *Frank* Court had considered in deciding that no warrant was necessary.[107] Thus before an administrative inspection the question to be asked is not whether a warrant should be required but rather whether a warrant *based on a certain standard of probable cause* should be required.

1. *Traditional Probable Cause Standard*

First, one must determine under what circumstances a warrant based on the traditional standard of probable cause

106. An example of this type of abuse may be found in Abel v. United States, 362 U.S. 217 (1960). In that case, the director of the Immigration and Naturalization Service issued an administrative warrant for petitioner's arrest based in part on information provided by the Federal Bureau of Investigation. Such warrants may be issued without probable cause. 8 C.F.R. § 242.2(a) (1973). The FBI cooperated with the INS in the execution of the warrant and the INS thoroughly searched the petitioner's belongings. Evidence discovered by the INS as well as evidence found by the FBI after petitioner vacated the room resulted in a subsequent espionage conviction. The Court held that the cooperation between the INS and the FBI was in good faith, so that the evidence seized by the INS was admissible in the criminal action. *See also* People v. Terraciano, 39 App. Div. 2d 1005, 333 N.Y.S. 2d 903 (1972).

107. *See* note 41 *supra*.

is necessary prior to an inspection. In making this determination, a useful distinction lies in the characterization of an inspection as "routine" or "nonroutine."[108] Generally, any nonroutine inspection—that is, one not part of a systematic program of inspection which naturally includes the property in question—should require a search warrant based on traditional probable cause. The justifications for applying anything less than the usual probable cause standard to administrative warrants are based on the need for area and periodic inspections. They simply do not pertain to nonroutine inspections. For example, if a building inspector wishes to inspect a warehouse which is not in the normal course of inspection, he should be required to show probable cause to believe a violation exists *in that building* in order to obtain a warrant.

Only one exception to the requirement of a warrant based upon the probable cause standard should be recognized for nonroutine inspections. Warrantless inspections of a very small category of highly regulated businesses, such as those dealing in firearms, food, drugs and liquor, should be permissible because there is in fact little expectation of privacy in the carrying on of such businesses. However, as this exception rests solely upon the occupant's limited privacy interest,[109] it should not be expanded to include inspections directed at the regulation of the activities of businesses which are not totally and pervasively regulated. In addition, the exception should not apply to remove the requirement of a warrant for nonroutine inspections of highly regulated businesses where there is a substantial possibility of a prosecution arising from the inspection. A recent case under a federal statute regulating the distribution of drugs[110] emphasized this point. In *United States v. Anile*,[111] a motion to suppress evidence obtained during a warrantless inspection of a drug store was granted because the inspection, prompted by complaints, was not routine. The court, distinguishing *Biswell*,[112] held that a warrant was required where it was reasonable to expect a trained investigator to recognize that the possibility of prosecution was great, stating:

108. *See* text following note 11 *supra*.
109. *See* text accompanying note 39 *supra*.
110. The inspections were conducted pursuant to Act of July 15, 1965, Pub L. No. 89-74, § 3(b), 79 Stat. 227, which was repealed in 1970.
111. 352 F. Supp. 14 (N.D.W. Va. 1973).
112. *Colonnade* was not mentioned in the opinion although there a nonroutine search was involved.

> The court recognizes that on many occasions it can be successfully argued that suspicion does not convert an administrative investigation into a traditional criminal investigation. The problem is, of course, one of degree. The prime consideration must be the protection of recognized basic individual rights, and these individual rights should not be affected by mere labels. . . .[113]

While recognizing that a high probability of prosecution compels the requirement of a warrant prior to the inspection of a highly regulated business, however, the court in *Anile* suggested the warrant need not be based on traditional probable cause.[114] Although there may be some circumstances where a warrant based on less than probable cause should be issued for a nonroutine inspection,[115] when an inspection begins to approximate a traditional criminal investigation a warrant should never be issued in the absence of traditional probable cause.

2. *Less than Probable Cause Standard*

Under the suggested approach, one must also determine under what circumstances a warrant based on less than prob-

113. 352 F. Supp. at 18.

114. The court noted that under section 880(d)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1970), a warrant for an administrative inspection might be obtained without traditional probable cause, stating:

> Perfunctory as it may be under present law, the decision of an independent judicial officer is still a necessary factor. That factor is totally missing in this case. Under the facts here, a search warrant obviously should have been obtained prior to the agents' first entry upon defendant's place of business.

352 F. Supp. at 18. The court does not seem to require that a warrant *backed by probable cause* be obtained when an investigation is nonroutine. *See also* United States v. Greenberg, 334 F. Supp. 368 (W.D. Pa. 1971).

115. If the court is wrong and no warrant is required for inspections under the Act even when the inspection is not routine, it probably would do no harm to issue a warrant based on the lesser standard. However, in a situation where a warrant *is* constitutionally required it should clearly be issued only on the traditional probable cause standard unless the search is one that is completely routine.

The Act itself defines probable cause as "a valid public interest in the effective enforcement of this sub-chapter or regulations thereunder sufficient to justify administrative inspections . . . in the circumstances specified in the application for the warrant." 21 U.S.C. § 880(d)(1) (1970). This language could be interpreted to apply only to administrative inspections that are routine.

Cf. the standards controlling the use of administrative summons for prosecutions, set forth in Donaldson v. United States, 400 U.S. 517 (1971). The basic requirements are that the administrative summons be issued prior to the recommendation for prosecution and in good faith.

able cause is necessary prior to an inspection. Such warrants are clearly required, even where an inspection is routine, for inspections of homes and code inspections of business premises; whether they are to be required for regulatory inspections not directed at highly regulated businesses has not yet been determined. There are two aspects of the relaxed probable cause standard set forth in *Camara* and *See*: the protection of individual privacy and the control of the unfettered discretion of inspectors.

a) Protection of individual privacy

With respect to the protection of individual privacy, the relaxed standard may result in a warrant which provides only illusory protection to the occupant of the premises to be inspected. In *See* the Court compared a search warrrant for an administrative inspection to the subpoena required when an administrative agency inspects corporate books or records.[116] Yet, in an administrative subpoena procedure, the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusal to reply. This judicial review would not be available under a typical warrant procedure.[117] Thus, unless *Camara* actually requires a refusal of entry before a warrant is sought,[118] a citizen might encounter, without warning, an inspector at the door of his home presenting a block warrant obtained in an *ex parte* proceeding. The resident would not be able to require the inspector to return at a later, more convenient time without risking either a forcible entry or prosecution. Since the block warrant would probably have been obtained on only a minimal showing that reasonable administrative or legislative standards to conduct an area inspection were satisfied, the occupant of the premises would ordinarily not benefit from the warrant requirement except in the rare situation where harassment by an inspector was apparent to the issuing magistrate from the face of the affidavits.

The privacy of the individual being inspected could be better preserved by a requirement that, in order for a routine administrative inspection to be reasonable under the fourth amendment, residents of a dwelling be given either prior no-

116. See v. Seattle, 387 U.S. 541, 544-45 (1967).
117. *Id. See also* K. DAVIS, ADMINISTRATIVE LAW § 3.06-.07 (3d ed. 1972); LaFave, *supra* note 90.
118. *See* text accompanying note 21 *supra*.

tice of the inspection or one opportunity to refuse admittance to the inspector. This requirement would allow the occupant to conceal any embarrassing conditions unrelated to the purpose of the inspection and, to the extent the inspection is aimed at compliance rather than prosecution,[119] would not frustrate the object of the inspection. However, to the extent the inspection is aimed at the regulation of businesses, the requirement would frustrate the often necessary element of surprise.

b) The discretion of the inspector

A second and far more significant aspect of the *Camara* decision is the curbing of the unfettered discretion of the inspector in the field to make arbitrary searches.[120] Routine inspections which are not unduly intrusive and are based on public necessity do not violate a citizen's fourth amendment rights if they are in fact routine. The problem arises in trying to insure that a "routine" inspection is actually that, rather than harassment of certain individuals or groups. There are several ways of ensuring that inspections which are ostensibly routine are not actually arbitrary or discriminatory. First, some inspections by their nature present little occasion for abuse of official authority; the political processes are such that no highly unreasonable inspection aimed at the community at large will be tolerated for long. Thus carefully-defined inspections of every house in a city or every person boarding a plane are almost certain to be routine. Absent this "political" check upon the conduct of an inspection, an administrative agency may be able to develop clear standards for some kinds of inspections, so that they take place only when certain criteria have been met. (Although it is conceivable that suitably narrow standards could be drafted in a statute for this purpose, this is rarely feasible.) Finally, an agency could itself issue a warrant, enforceable in court. The *Camara-See* Court chose yet another method to isolate and control arbitrary searches during routine inspections where a warrant based on probable cause would be administratively self-defeating. The warrant based on the relaxed standard of probable cause was seen as an accommodation of administrative feasibility and the protec-

119. *See* text following note 43 *supra*.

120. Camara v. Municipal Court, 387 U.S. 523, 532 (1967). This point was also emphasized in Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

tion of privacy. The Court in *Camara* stressed that it was not attempting to reassess the basic agency decision to canvass a particular area, but rather to ensure that the inspector was operating within the scope of his proper authority.[121] To the extent this is the point of the *Camara* and *See* warrants, criticism of their inability to protect the privacy of the individual whose property is inspected is misplaced. Although eventually better ways may be found to achieve control of inspectors' discretion, the *Camara* and *See* opinions at least defined that as a primary goal.

Thus, the chief problem with the relaxed probable cause standard is not that it results in "paper" warrants for routine inspections, for these "paper" warrants have their purpose, but that it may result in the dilution of the probable cause requirement in other inappropriate situations. The suggestion in *United States v. Anile* that, although a warrant was required, it need not have been based on traditional probable cause is an example of an arguably improper use of the relaxed standard. The temptation to carry over the *Camara* and *See* warrants to other contexts is great because there are some circumstances in which they seem both harmless and useful. In the few cases where a warrant is not required for a nonroutine inspection, for example, there would seem to be no objection to permitting the issuance of a warrant based on the relaxed standard.[122] Similarly, such warrants may be desired for routine searches in some circumstances even though they are not necessary under *Camara* or *See*. Thus a warrant may seem desirable when, under a statute with a specific sanction for refusal of entry, such as that in *Colonnade*, inspectors anticipate a refusal of entry but think it important, in the event of such refusal, to inspect rather than merely to prosecute for refusal of entry.[123] Nevertheless, if warrants are to be issued in such circumstances the courts should make clear that they may be obtained only on a showing of traditional probable cause *unless* the inspection is clearly routine or the warrant is not required for a valid inspection.

121. 387 U.S. at 532.

122. *See* United States v. Ciaccio, 356 F. Supp. 1373 (D. Md. 1972), in which the defendant argued that a warrant issued for an inspection of a retail liquor dealer was invalid because it was not based on the usual probable cause standard and that permitting a warrant based on a lesser standard undercut the defendant's opportunity to choose the lesser crime of entry refusal. The court held that the lesser probable cause standard was appropriate but that, in any case, traditional probable cause existed.

123. *Id.*

IV. ADMINISTRATIVE SEARCH WARRANTS IN MINNESOTA

Where as a matter of constitutional law search warrants are required for routine administrative inspections, present Minnesota law provides little guidance as to governing procedures or even as to whether such warrants may be obtained.

The common law authorized magistrates to issue warrants for searches for stolen goods. Where the search is not for stolen goods and the issuance of a warrant is not specifically authorized by statute, the courts have disagreed as to whether a warrant may be issued. Several courts have held that a search under the authority of a warrant not authorized at law is an unreasonable search and seizure; others, however, have validated inspections which were made with warrants not authorized by statute.[124] For example, in New York a warrant to inspect cattle for brucellosis and a second warrant to inspect a barn and dairy cows for compliance with sanitation standards were issued shortly after *See* and *Camara* were decided. New York had at the time no statute authorizing the issuance of a warrant for these purposes. The court based its power to issue a warrant on a section in the New York constitution providing that the New York State supreme court "shall have general original jurisdiction" and on language in the Judiciary Law giving a court of record power "to devise and make new process and forms of proceedings necessary to carry into effect the powers and jurisdiction possessed by it."[125] Similar language in the Minnesota statutes served as the basis for an opinion by the Minnesota Attorney General holding that

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124. *See, e.g.*, Owens v. North Las Vegas, 85 Nev. 105, 107, 450 P.2d 784, 785-86 (1969), where the court stated:

> The thrust of appellant's principal argument is that the search warrant was invalid . . . . The alleged invalidity is based on appellant's contention that the four grounds for the issuance of search warrants, as provided in NRS 179.020, in effect at the time of the search, are exclusionary of any other grounds. . . . In other words, because the search warrant was not specifically authorized by our state statutes, the search was invalid. Appellant's contention is wholly without merit, because it misses the point. The question is not whether the search was authorized by our state law. The question is, rather, whether the search was reasonable under the Fourth Amendment to the United States Constitution.

125. Blabey, *See and Camara: Their Far-Reaching Effect on State Regulatory Activities and the Origin of the Civil Warrant in New York*, 33 ALB. L. REV. 64, 80 (1968).

issuance of administrative warrants was within the power of the district and municipal courts.[126]

The issuance of search warrants in Minnesota is governed by sections 626.04 to 626.22 of the Minnesota statutes. Section 626.07 describes the grounds on which search warrants may issue, permitting searches for the fruits, instrumentalities and evidence of crime and for certain contraband:

> Grounds for issuance. A search warrant may be issued upon any of the following grounds:
> 1) The property or things were stolen or embezzled;
> 2) The property or things were used as the means of committing a crime;
> 3) The possession of the property or things constitutes a crime;
> 4) The property or things are in the possession of any person with the intent to use them as a means of committing a a crime, or the property or things so intended to be used are in the possession of another to whom they have been delivered for the purpose of concealing them or preventing their being discovered;
> 5) The property or things to be seized consist of any item or constitute any evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The property or things described in this section may be taken pursuant to the warrant from any place, or from any person in whose possession they may be.[127] The other sections set out procedures for issuance of search warrants. Substantial limitations are placed on the power of the court to issue warrants; for example, a warrant may be issued only to a peace officer in the county in which it is to be served and may be served only by that

126. The Minnesota Attorney General ruled shortly after the *Camara* and *See* decisions that statutory authority for the issuance of search warrants for housing and building code inspections existed by virtue of the powers granted to the district courts by MINN. STAT. § 484.03 (1971):

> Such courts shall have power to issue writs of injunction, ne exeat, certiorari, habeas corpus, mandamus, quo warranto, and all other writs, processes, and orders necessary to the complete exercise of the jurisdiction vested in them by law, including writs for the abatement of a nuisance. Any judge thereof may order the issuance of such writs, and direct as to their service and return.

and to the municipal courts by MINN. STAT. § 484.04(2) (1971):

> Except as otherwise provided in the municipal court act, each municipal court possesses the powers and jurisdiction of the district court. It may issue all civil and criminal process necessary or proper to enforce and carry out its jurisdiction and determinations.

Minn. Op. Att'y Gen. 59a-9 (July 28, 1967).

127. MINN. STAT. § 626.07 (1971).

officer. Clearly, section 626.07 does not contemplate issuance of administrative search warrants. The central question, then, is whether the grounds for issuance of warrants in section 626.07 are exclusive, thus limiting the power to issue warrants on other grounds, or whether the section is descriptive rather than restrictive. Even if the section does lay down exclusive grounds for warrants for traditional criminal searches, it is unlikely that it was intended to prohibit the issuance of warrants where no criminal activity is suspected.[128] Since the section was enacted while *Frank* was still authoritative and no warrants were required for administrative searches, it is probable that the legislature was simply not addressing this problem. Thus the question of whether administrative search warrants should be issued by Minnesota courts should not be decided with reference to only the language of the statute; other approaches should be pursued.

Initially, issuance of such warrants without express statutory authority may be justified by the consideration that the purpose of a warrant requirement is to provide an independent determination by a neutral magistrate of the necessity for a search, rather than permtting the official in the field to exercise unbridled discretion. This purpose would not be undermined by permitting issuance of warrants on grounds other than those set out in the statute. In addition, the inspection statutes themselves may be viewed as providing implicit authority for the issuance of such warrants as are required for their enforcement. This rationale was recently rejected by the Supreme Court of Arkansas in *Grimmett v. State* but might be persuasive to other courts.[129]

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128. Minn. Op. Att'y Gen. 59a-9 (July 28, 1967) took this approach, stating that MINN. STAT. §§ 626.01-.21 "are intended to provide a procedure for the issuance of search warrants in criminal cases and are not devised as a limitation on a common law power and authority of the court." The opinion noted that prior to the passage of the current statute there was no specific authority to search for the instrumentality of a crime, but the authority of the court to issue warrants for this purpose was never questioned.

129. 251 Ark. 270A, 476 S.W.2d 217 (1972). In *Grimmett*, a dispensing physician was convicted of failing to maintain a complete and accurate record of drugs on the basis of evidence obtained during a search of his premises under the authority of a search warrant. Although the Arkansas search warrant statutes did not expressly authorize searches for contraband, the Arkansas Drug Abuse Control Act comprehensively regulated the sale of drugs and included a provision authorizing health officers to conduct inspections and execute search warrants and arrest warrants. The court nevertheless reversed the conviction and ordered

Assuming that the grounds for issuance of search warrants presented in section 626.07 are not exclusive, a further question arises as to whether the procedural restrictions contained in the other sections of the statute apply to warrants issued on other grounds. Although the statute may not be directed at administrative inspections, the language of the sections is mandatory and does not limit their scope to searches authorized under section 626.07. Thus, even if warrants may be issued on grounds other than those recited in section 626.07, the need for specific legislation for administrative search warrants becomes apparent since the procedures contained in the present statute are wholly unsuitable for such warrants. For example, should it become necessary to obtain warrants with any degree of frequency, it may be an impossible administrative burden to ensure that a peace officer, defined in the statute as a "sheriff, deputy sheriff, policeman, or constable," serves the warrant.[130] More significantly, section 626.08 states:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property or thing to be seized, and particularly describing the place to be searched.[131]

Although arguably this section merely incorporates the constitutional requirements for a warrant and could be satisfied by meeting the lesser probable cause standard of *Camara*, it is also possible that it requires "probable cause to believe that a violation exists," an interpretation which would prevent any effective area inspection program from being carried out. In addition, there should be certain restrictions on administrative inspections which are not contained in the present statute.[132] Under the statute, for example, a warrant may be served at any time during the day, presumably even very early in the morning, without prior notice to the party whose premises are to be searched.

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the evidence suppressed, holding that in the absence of statutory or common law authorization of a search warrant for contraband, the product of a search conducted pursuant to such a warrant is inadmissible. *Grimmett* is not the case of a typical administrative inspection since the warrant was obtained and served by a police officer in the process of a criminal investigation. However, other courts might be equally unwilling to infer authority for issuance of administrative warrants from statutes authorizing inspections.

130. MINN. STAT. § 626.05(2) (1971).

131. MINN. STAT. § 625.08 (1971).

132. *See* text accompanying note 58 *supra*.

Minneapolis has attempted to solve the problem of lack of statutory authority for issuance of administrative search warrants by enacting a city ordinance authorizing warrants for municipal inspections. Minneapolis Code of Ordinances section 67.020 provides:

> The Director of Inspections, or his designated representatives may enter, examine and survey at all reasonable times all dwellings . . . and premises after obtaining consent from the occupant of the premises. In the event that the occupant of the premises does not consent to entry . . . and if there is probable cause to believe a violation of the Minneapolis Codes exists in the premises, then application may be made to the Court for a search warrant for the purpose of inspecting the premises. . . .[133]

In the absence of action by the legislature, other municipalities may choose to enact similar ordinances. However, there are two problems with the Minneapolis ordinance which suggest that this is not the preferred solution. First, the ordinance provides no authorization for a strictly area inspection, so that a warrant evidently cannot be obtained unless a complaint is received or violations are apparent from the exterior of the premises to be searched. Second, it is not clear that even home-rule municipalities have power to enact such ordinances, especially in the face of a possibly inconsistent statutory provision.[134]

Several states have responded to the *Camara* and *See* cases by enacting statutes specifically authorizing the issuance of warrants for administrative inspections.[135] Such a statute is needed in Minnesota to resolve the uncertainties as to whether and under what circumstances administrative warrants may be issued. The following analysis will compare certain provisions of administrative warrant statutes in other states and suggest the approach a Minnesota statute might take regarding each issue.

A. Scope

The initial question is whether an administrative warrant statute should obligate inspectors to seek warrants in certain situations or merely provide a procedure for the issuance of

133. Mpls. Code of Ordinances § 67.020 (1972). *See also* Duluth Legis. Code § 29A-3(4) (Supp. 1966); St. Paul Legis. Code § 54.18(6) (Supp. 1972).

134. *See, e.g.*, Nelson, *Building, Health and Housing Code Inspection in Missouri: A Need for Legislation*, 27 J. Mo. Bar 572 (1971).

135. *E.g.*, Cal. Civ. Pro. Code §§ 1822.50-.57 (West 1972); N.C. Gen. Stat. §§ 15-27.1 to -27.2 (Supp. 1973); N.D. Cent. Code §§ 29-29.1-01 to -06 (Supp. 1971); R.I. Gen. Laws §§ 45-24.3-14 to -15 (Supp. 1972); Wis. Stat. Ann. §§ 66.122-.123 (Supp. 1973).

warrants when they are constitutionally required. The North Carolina and North Dakota statutes, which are substantially similar, authorize inspection warrants where

> such a search or inspection is one that is elsewhere authorized by law . . . and is one for which such a warrant is constitutionally required.[136]

The primary advantage of this phraseology is that the statute will remain current even as new Supreme Court decisions redefine the inspection warrant requirement. The purpose of such a statute is clearly to avoid obligating inspectors to obtain warrants when not absolutely necessary; however, the effect is also to leave unclear when warrants *may* be obtained. Another approach would be to incorporate into the language of the statute standards regulating the circumstances under which warrants must be obtained; these standards would either approximate the constitutional requirements or would require warrants in some circumstances in which the Constitution would not. This is probably not the most desirable solution because the constitutional requirements are difficult to define and the protection of the citizen whose premises are to be inspected is better provided by requiring prior notice of the inspection rather than a warrant which will be issued in an *ex parte* proceeding and possibly executed without prior notice.[137] The statute could also simply authorize the issuance of warrants, so that they need be obtained only when constitutionally required but may be obtained whenever administratively desirable.[138]

An administrative inspection statute need not apply to all inspections. The California statute is limited to inspections "authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health or zoning."[139] It does not appear to cover most business regulation inspections. The Wisconsin statute, on the other hand, contains a much more comprehensive list of inspections to which it applies, including food, zoning, weights and measures and pollution.[140] The North Dakota and North Carolina Statutes permit warrants for inspections otherwise authorized by law.[141] Although, as dis-

136. N.C. GEN. STAT. § 15-27.2 (Supp. 1973); N.D. CENT. CODE § 29-29.1-01 (Supp. 1971).
137. *See* text following note 118 *supra*.
138. *See, e.g.*, CAL. CIV. PRO. CODE § 1822.51 (West 1972).
139. CAL. CIV. PRO. CODE § 1822.50 (West 1972).
140. WIS. STAT. ANN. § 66.122(1) (Supp. 1973).
141. N.C. GEN. STAT. § 15-27.2 (Supp. 1973); N.D. CENT. CODE § 29-29.1-01 (Supp. 1971).

cussed earlier, it is unlikely that inspections for violations of the food and drug laws and other laws covering closely regulated activities require a warrant,[142] there seems to be little reason not to *allow* warrants for inspections under these laws. In addition, there still may be some types of business regulation inspections for which warrants are constitutionally required. If so, it is important that the statute authorize the issuance of warrants for these inspections as well as for municipal code inspections. Thus either the Wisconsin or the North Carolina-North Dakota approach should be adopted.

B. STANDARDS FOR ISSUANCE

Most of the statutes passed to date have incorporated the probable cause standard enunciated in *Camara* that reasonable administrative or legislative standards for conducting an area inspection must be satisfied.[143] Since the statute should apply to periodic inspections of regulated businesses as well as to area inspections, some inclusive language to this effect should be added to the statement of the standard. In order that the statute be used for complaint inspections as well as routine inspections, sufficient cause should also be deemed to be shown whenever there is probable cause to believe a violation of a state or local law exists with regard to the premises or vehicle to be searched.[144]

C. REQUIREMENT OF PRIOR REFUSAL OF ENTRY

The Supreme Court suggested in *Camara*, but not in *See*, that consent to entry should be refused before a warrant is

142. *See* text accompanying notes 47-57 *supra*.

143. *See* CAL. CIV. PRO. CODE § 1822.52 (West 1972); N.C. GEN. STAT. § 15-27.2(1) (Supp. 1973); N.D. CENT. CODE § 29-29.1-02(1) (Supp. 1971). The Rhode Island statute simply requires that "probable cause exists for the inspection." R.I. GEN. LAWS § 45-24.3-15 (Supp. 1972).

144. *See* CAL. CIV. PRO. CODE § 1822.52 (West 1972), which requires only that

> either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises or vehicle.

North Dakota and North Carolina require either that the inspection be part of a legally authorized program of inspection that naturally includes the property or that there is probable cause to believe there is a condition which legally justifies the inspection. N.C. GEN. STAT. § 15-27.2(c)(1) (Supp. 1973); N.D. CENT. CODE § 29-29.1-02(1) (Supp. 1971).

sought. A statute requiring that consent be refused before administrative warrants can issue would avoid the possibility of the issuance of blanket warrants covering the entire area to be inspected. However, this consent refusal requirement must be qualified so that warrants may be obtained in advance where surprise is essential to the purpose of the inspection.

California has resolved this problem by providing that "the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent."[145] The Wisconsin statute provides:

> [S]pecial inspection warrants shall be issued for inspection of personal or real properties which are not public buildings or for inspection of portions of public buildings which are not open to the public only upon showing that consent to entry for inspection purposes has been refused.[146]

Neither solution is entirely satisfactory. The California provision gives no guidance as to what will be considered sufficient reason not to seek consent. Under this provision the administrative convenience which would result from obtaining at one time a large number of warrants covering the entire area to be inspected could arguably serve as the basis for the issuance of warrants without prior refusal of consent. In contrast, the Wisconsin statute does not go far enough; surprise inspections may be required of the nonpublic portions of public buildings or even of nonpublic buildings. An intermediate approach might provide, for example, that the affidavit must show either that consent has been refused or that lack of notice is required for effective enforcement of the statute or code provision authorizing the inspection.

D. Notice

The California statute provides that where prior consent has been sought and refused notice must be given at least 24 hours before the warrant is executed, unless the judge finds immediate execution to be reasonably necessary.[147] Mailing such notice to the address in question would probably satisfy this provision, although this should be spelled out. The objection to the notice requirement, aside from the slight administrative inconvenience involved in dispatching the notice, is the resulting

145. Cal. Civ. Pro. Code § 1822.51 (West 1972).
146. Wis. Stat. Ann. § 66.122(2) (Supp. 1973).
147. Cal. Civ. Pro. Code § 1822.56 (West 1972).

delay of the inspection. In the case of inspections of dwellings, the extra privacy afforded the resident and the likely reduction in hostility toward the inspecting agencies should be well worth the delay. However, where a business regulation inspection is involved, the delay might frustrate the purpose of the inspection. Although California has tied the notice requirement to the prior refusal of entry, so that presumably surprise was not considered essential to the inspection before it was attempted,[148] the statute as worded renders impossible what would otherwise be the normal practice:[149] the inspector would seek entry by consent and, if refused, would immediately obtain and execute a warrant. Especially if the requirement of prior refusal of consent obtains in most cases, this provision would complicate unnecessarily the enforcing agency's job. Thus notice should be required only for the inspection of a dwelling.

E. Duration

The time allowed for execution of warrants varies from 24 hours in North Dakota[150] and North Carolina[151] to 14 days in California.[152] Twenty-four hours is probably not sufficient because of the problem an inspector might have in finding a resident at home. Execution should be permitted only during business hours unless the magistrate determines that entry at some other time is required.

F. Forcible Entry

The California statute prohibits forcible entry except where expressly authorized by a judge on the basis of evidence of "a violation of a state or local law or regulation . . . which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccess-

148. The statute requires an affidavit stating either that consent has been refused or facts and circumstances reasonably justifying the failure to seek such consent. Cal. Civ. Pro. Code § 1822.51 (West 1972). In cases where consent was withheld, notice that a warrant was issued must be given 24 hours before it is executed, unless the judge finds immediate execution to be reasonably necessary. Cal. Civ. Pro. Code § 1822.56 (West 1972).

149. Cal. Civ. Pro. Code § 1822.56 (West 1972).

150. N.D. Cent. Code § 29-29.1-04 (Supp. 1971).

151. N.C. Gen. Stat. § 15-27.2(e) (Supp. 1973).

152. Cal. Civ. Pro. Code § 1822.55 (West 1972).

ful."[153] This provision is desirable since the normal inspection is not a matter so urgent as to justify forcible entry. Especially if a warrant is obtained without notice or prior refusal of consent to inspect and is based on the lesser probable cause standard of *Camara*, forcible entry should not be permitted.

G. USE OF EVIDENCE OBTAINED DURING ADMINISTRATIVE INSPECTION

The general rule for criminal searches is that any evidence discovered during a valid search is admissible even if it was not the object of the search.[154] However, several of the statutes provide that where an inspection warrant is constitutionally required any evidence which was not a legal object of the inspection cannot be used in a subsequent proceeding.[155] This provision is reasonable because it prevents the collaboration of inspectors and law enforcement officials who desire a search but lack probable cause. If a lessened probable cause standard permits access to premises which would otherwise remain closed to inspection, the fruits of a search based on such a standard should be used only for the purposes which initially justified the lesser standard.

H. PRIOR HEARING

One of the frequently-voiced objections to *Camara's* lesser probable cause standard is that, since the warrant is issued in an *ex parte* proceeding, it provides relatively little protection to the occupant of the premises to be searched. In *See* the Court compared the warrant requirement with an administrative subpoena. However, a subpoena provides considerably more protection than a warrant issued on the relaxed probable cause standard because the subpoenaed party may obtain judicial review prior to suffering penalties for failure to comply. An innovative approach to this problem would be to develop an administrative warrant, akin to the administrative subpoena and issued by the inspecting agency itself, which would be enforceable only by the courts. The person whose privacy would be violated by the inspection could thus obtain judicial review before submitting to the inspection without risking sanctions for refusing entry to the inspector. The primary objection to this

153. CAL. CIV. PRO. CODE § 1822.56 (West 1972).
154. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971).
155. N.C. GEN. STAT. § 15-27.2(f) (Supp. 1973); N.D. CENT. CODE § 29-29.1-05 (Supp. 1971).

approach would be that frequently-inspected businesses might routinely go to court and thus avoid inspections except when they were prepared to be inspected. Whether this objection is of any great significance depends on the scope of the *See* and *Biswell* cases. If *Biswell* is given a broad reading, no warrant is required in the above situation in any event. If *Biswell* is limited to inspections of activities relating to firearms and perhaps food and drugs, prior review in other cases might impose an unmanageable burden on the inspection system.

V. CONCLUSION

It now appears that warrants are constitutionally required for administrative searches in only a limited number of circumstances; most statutes which are directed at a particular, highly-regulated business activity probably may be enforced by warrantless inspections. However, there is little guidance available for administrators enforcing statutes and ordinances regulating activities which do not clearly fall under the *Biswell* and *Colonnade* rules. The problem is exacerbated by the failure of Minnesota search warrant law to detail clearly the circumstances under which administrative search warrants may be issued. At least until the constitutional requirements are clarified, it would be useful for the legislature to make such warrants available to administrative agencies in all situations, whether or not they are constitutionally necessary. In addition, some statutes which regulate activities which may otherwise be subject to warrantless inspection may not be sufficiently narrow to come under the *Biswell* rule. Either these statutes should be legislatively modified to narrow their scope, or the administrative agencies charged with their enforcement should adopt mandatory regulations particularizing the allowable time, place and scope of the inspections.